DOCKET

No. 07-526

Title: Donald L. Carcieri, Governor of Rhode Island, et al., Petitioners
v.
Dirk Kempthorne, Secretary of the Interior, et al.

Docketed: October 23, 2007

Lower Ct: United States Court of Appeals for the First Circuit

Case Nos.: (03-2647)

Decision Date: July 20, 2007

Questions Presented

Date	Proceedings and Orders
Oct 18 2007	Petition for a writ of certiorari filed. (Response due November 23, 2007)
Nov 16 2007	Order extending time to file response to petition to and including December 26, 2007.
Nov 21 2007	Brief amici curiae of Alabama, et al. filed.
Dec 20 2007	Order further extending time to file response to petition to and including January 25, 2008.
Jan 25 2008	Brief of respondents Dirk Kempthorne, Secretary of the Interior, et al. in opposition filed.
Jan 25 2008	Motion for leave to file amici brief out of time filed by Citizens Equal Rights Foundation, et al.
Feb 5 2008	Reply of petitioners Donald L. Carcieri, Governor of Rhode Island, et al. filed. (Distributed)
Feb 6 2008	DISTRIBUTED for Conference of February 22, 2008.
Feb 25 2008	Motion for leave to file amici brief out of time filed by Citizens Equal Rights Foundation, et al. DENIED.
Feb 25 2008	Petition GRANTED limited to Questions 1 and 2 presented by the petition.
Mar 24 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 12, 2008.
Apr 21 2008	The time within which to file the joint appendix and petitioners' briefs on the merits is further extended to and including May 23, 2008.
Apr 21 2008	The time within which to file respondents' brief on the merits is extended to and including July 14, 2008.
May 9 2008	The time within which to file the joint appendix and petitioners' briefs on the merits is further extended to and including June 6, 2008.
May 9 2008	The time within which to file respondents' brief on the merits is further extended to and including August 11, 2008.
Jun 6 2008	Joint appendix filed. Statement of costs received.
Jun 6 2008	Brief of petitioner Donald L. Carcieri, Governor of Rhode Island filed.
Jun 6 2008	Brief of petitioner Town of Charlestown, Rhode Island filed.

Jun 6 2008	Brief of petitioner State of Rhode Island filed.
Jun 13 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for petitioner Rhode Island.
Jun 13 2008	Brief amici curiae of Council of State Governments, et al. filed.
Jun 13 2008	Brief amici curiae of Alabama, et al. filed.
Jun 19 2008	Motion for leave to file amici brief out of time filed by Citizens Equal Rights Foundation, et al.
Jul 11 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for petitioner Donald L. Carcieri, Governor of Rhode Island
Jul 31 2008	CIRCULATED
Aug 5 2008	The time within which to file respondents' brief on the merits is further extended to and including August 18, 2008.
Aug 18 2008	SET FOR ARGUMENT ON Monday, November 3, 2008.
Aug 18 2008	Motion for leave to file amici brief out of time filed by Citizens Equal Rights Foundation, et al. GRANTED.
Aug 18 2008	Motion for divided argument filed by petitioners Donald L. Carcieri, Governor of Rhode Island and petitioner the State of Rhode Island.
Aug 18 2008	Brief of respondents Dirk Kempthorne, Secretary of the Interior, et al. filed. (Distributed)
Aug 21 2008	Proposal of counsel for respondents' to lodge copies of 4 documents cited in the respondents' brief filed.
Aug 25 2008	Motion for divided argument filed by petitioner Town of Charlestown.
Aug 25 2008	Brief amicus curiae of National Congress of American Indians filed. (Distributed)
Aug 25 2008	Brief amicus curiae of Narragansett Indian Tribe filed. (Distributed)
Aug 25 2008	Brief amicus curiae of Law Professors Specializing in Federal Indian Law filed. (Distributed)
Aug 25 2008	Brief amici curiae of Historians Frederick E. Hoxie, Paul C. Rosier, and Christian W. McMillen filed. (Distributed)
Aug 25 2008	Brief amici curiae of Standing Rock Sioux Tribe, and Nottawaseppi Huron Band of the Potowatomi filed. (Distributed)
Aug 26 2008	Motion of Narragansett Indian Tribe for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 26 2008	Lodging proposal of respondents to lodge four documents from the Department of Interior approved by the Clerk of Court.
Aug 26 2008	Lodging consisting of four documents received from counsel for the respondents. (Distributed).
Aug 28 2008	Record received from U.S.D.C for the District of Rhode Island. (3 boxes) U.S.C.A. for the 1st Circuit record included
Aug 28 2008	Objection of the Town of Charlestown to motion of Governor and Attorney

	General for divided argument.
Sep 3 2008	Reply to Town of Charlestown's opposition to motion of petitioners for divided argument filed by petitioner Rhode Island.
Sep 17 2008	Reply of petitioner Donald L. Carcieri, Governor of Rhode Island filed. (Distributed)
Sep 17 2008	Reply of petitioner State of Rhode Island filed. (Distributed)
Sep 17 2008	Reply of petitioner Town of Charlestown, Rhode Island filed. (Distributed).
Oct 6 2008	Motion for divided argument filed by petitioner DENIED.
Oct 6 2008	Motion for divided argument filed by petitioner DENIED.
Oct 6 2008	Motion of Narragansett Indian Tribe for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 27 2008	Response of petitioner Carcieri to the motion of Town of Charlestown for reconsideration of the motion for divided argument.
Oct 27 2008	Motion for reconsideration of the motion for divided argument filed by petitioner Town of Charlestown.
Oct 27 2008	Response of petitioner Rhode Island to the motion of Town of Charlestown for reconsideration of the motion for divided argument.
Oct 29 2008	Motion for reconsideration of the motion for divided argument filed by petitioner State of Rhode Island.
Oct 29 2008	Response in opposition of petitioner Town of Charlestown to motion of State of Rhode Island for reconsideration of motion for divided argument.
Oct 31 2008	Motion for reconsideration of the motion of Rhode Island for divided argument DENIED.
Oct 31 2008	Motion for reconsideration of the motion of Town of Charlestown for divided argument DENIED.
Nov 3 2008	Argued. For petitioners: Theodore B. Olson, Washington, D.C. For respondents: Deanne E. Maynard, Assistant to the Solicitor General, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

FILED
OCT 18 2007
OFFICE OF THE CLERK

No. 07-526

In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

Governor Donald L. Carcieri
By His Attorney,

CLAIRE RICHARDS*
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

State of Rhode Island
By Its Attorney,

PATRICK C. LYNCH
Attorney General

NEIL F.X. KELLY*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor
for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 permits the Secretary to take land into trust for certain Indian tribes, significantly impairing state jurisdiction. The Fifth Circuit held that the 1934 Act "positively dictates" that the only Indian tribes for whom land can be taken into trust are those that were "recognized" and "under federal jurisdiction" as of "June 1934." This Court similarly concluded in that the 1934 Act contained a temporal "recognized [in 1934] tribe" limitation. *United States v. John*, 437 U.S. 634 (1978) (bracket by Court). The Ninth Circuit affirmed a district court decision to the same effect.

The Rhode Island Indian Land Claims Settlement Act provides land specifically for the later recognized Narragansett Indian Tribe and comprehensively disposes of all Indian land claims in Rhode Island. The Tribe received 1,800 acres of land for free. In exchange, Congress extinguished aboriginal title and all Indian interests in land in Rhode Island.

The questions presented are:

1. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.

3. Whether providing land "for Indians" in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	13
I. THE FIRST CIRCUIT'S APPLICATION OF THE IRA TO A TRIBE NOT BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934 CONFLICTS WITH OPINIONS OF THE FIFTH AND NINTH CIRCUITS AND THIS COURT	13
II. THIS COURT SHOULD DETERMINE WHETHER CONGRESSIONAL EXTINGUISHMENTS OF ABORIGINAL TITLE AND INDIAN INTERESTS IN OR RIGHTS INVOLVING LAND FORECLOSE INDIAN TERRITORIAL SOVEREIGNTY	21
1. Defining the Reach of Congressional Extinguishments of Indian Interests in Land is Critically Important to Settlement Act States	23

TABLE OF CONTENTS – Continued

Page

2. The First Circuit's Restriction of Aboriginal Title to a Mere Fee Interest Conflicts with Opinions of the Ninth and Second Circuits – as Well as Teachings of this Court – Defining Aboriginal Title as Inclusive of a Sovereignty Interest 26

3. The First Circuit's Opinion is Wrong..... 32

III. THE CONGRESSIONALLY DELEGATED AUTHORITY TO PROVIDE LAND "FOR INDIANS" CONTAINS NO GUIDANCE FOR THE SECRETARY'S DISCRETIONARY TRUST TAKING POWER 35

CONCLUSION 40

APPENDIX

Opinion of the United States Court of Appeals for the First Circuit dated July 20, 2007..... App. 1

Stay of the Mandate of First Circuit issued on August 16, 2007 ..... App. 82

Decision of the United States District Court for the District of Rhode Island dated September 29, 2003 ..... App. 84

Order of the First Circuit dated September 16, 2005 ..... App. 137

Order of the First Circuit dated December 5, 2006 ..... App. 139

25 U.S.C. §465 ..... App. 142

TABLE OF CONTENTS – Continued

Page

25 U.S.C. §479 ..... App. 143

Letter from Asst. Comm. E. B. Meritt, Office of Indian Affairs to Mr. John Noka dated May 5, 1927 ..... App. 144

Letter from Asst. Comm. E. B. Meritt, Office of Indian Affairs to Mr. Daniel Sekater dated June 29, 1927 ..... App. 145

Letter from Commissioner, Office of Indian Affairs to Rep. John M. O'Connell dated March 18, 1937 ..... App. 146

Rhode Island Indian Claims Settlement Act, 25 U.S.C. §1701 *et seq.* ..... App. 148

Letter from Bureau of Indian Affairs to Chief Sachem Matthew Thomas dated March 6, 1998 ..... App. 162

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) 24

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 38

Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) ..... *passim*

Carcieri v. Norton, 290 F.Supp.2d 167 (D.R.I. 2003) 1, 7, 9, 23

Carcieri v. Norton, 398 F.3d 22 (1st Cir. 2005) 10

Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) 10

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13, 14

City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157 (D.D.C. 1980) 19

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 36

Kahawaiolaa v. Norton, 222 F.Supp.2d 1213 (D.Haw. 2002) 17

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 14, 17

Mistretta v. United States, 488 U.S. 361 (1989) 36, 37, 38

Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998) 27, 28

TABLE OF AUTHORITIES – Continued

Page

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) 8, 21

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 24

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 36

Rossiter v. Potter, 357 F.3d 26 (1st Cir. 2004) 17

Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) 4, 27, 29, 30, 32

Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2006) 36

South Dakota v. Department of Interior, 69 F.3d 878 (8th Cir. 1995) 36

South Dakota v. Department of Interior, 423 F.3d 790 (8th Cir. 2005) 36

South Dakota v. United States, 69 F.3d 878 (8th Cir. 1995) 36

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997) 37

United States v. John, 437 U.S. 634 (1978) ..... *passim*

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) 36

United States v. Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) 14, 16, 18

Western Mohegan Tribe v. Orange County, 395 F.3d 18 (2nd Cir. 2004) 28, 29

TABLE OF AUTHORITIES – Continued

Page

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 29

Whitman v. American Trucking Assn. Inc., 531 U.S. 457 (2001) 36, 37, 38

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Art. I, §1 ..... 1, 36

STATUTES

18 U.S.C. §1151 ..... 24, 30, 37

18 U.S.C. §1153 37

25 U.S.C. §177 6

25 U.S.C. §461 2

25 U.S.C. §465 ..... *passim*

25 U.S.C. §467 37

25 U.S.C. §472 19

25 U.S.C. §479 ..... *passim*

25 U.S.C. §1701 ..... 2, 4, 7

25 U.S.C. §1704 35

25 U.S.C. §1705(a)(2) 7, 22, 35

25 U.S.C. §1705(a)(3) 7, 22, 33, 34, 35

25 U.S.C. §1707(c) 34, 35

25 U.S.C. §1708(a) 7

25 U.S.C. §1712(a)(2) 7, 22

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. §1712(a)(3) 7, 22, 33

25 U.S.C. §1723(b) 25

25 U.S.C. §1723(c) 25

25 U.S.C. §1753(b) 25

25 U.S.C. §1753(c) 25

25 U.S.C. §1771b(b) 25

25 U.S.C. §1775b(d)(1)(A) 25

25 U.S.C. §1775b(d)(1)(B) 25

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 9

43 U.S.C. §1603(a) 25

43 U.S.C. §1603(b) 25

Coquille Restoration Act, Pub. L. No. 101-42 (1989) 20

Hoopa-Yurok Settlement Act, 100-580 (1988) 20

OTHER AUTHORITIES

Felix S. Cohen, Handbook of Federal Indian Law, Chapter 9 at 472 (1982 ed.) 32

Theodore H. Hass, Ten Years of Tribal Government Under I.R.A. (1947) 19

Theodore Taylor, Bureau of Indian Affairs, "Report on Purchase of Indian Land and Acres in Trust 1934 – 1975," Appendix A3 15

TABLE OF AUTHORITIES – Continued

Page

William W. Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331 (1990) 6, 19

OPINIONS BELOW

The First Circuit sitting en banc issued a divided opinion, the subject of this appeal, reported at 497 F.3d 15 (1st Cir. 2007)(en banc) and reprinted in the Appendix ("App.") App 1. The en banc court upheld a decision of the District Court for the District of Rhode Island reported at 290 F.Supp.2d 167 (D.R.I. 2003). App.84.

JURISDICTION

The final Judgment of the Court of Appeals was entered on July 20, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, §1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, it shall consist of a Senate and House of Representatives.

Pertinent provisions of the Indian Reorganization Act of 1934 (the "1934 Act" or the "IRA"), 25 U.S.C. §465 and §479 are reprinted at App.142 and 143, and the Rhode Island Indian Claims Settlement Act (the

"Settlement Act") 25 U.S.C. §1701 *et seq.*, is reprinted at App.148-161.

INTRODUCTION

This petition presents jurisdictional issues of enormous import not only to Rhode Island, but also to scores of other states and tribes across the country.[1] That is because the future allocation of civil and criminal jurisdiction between states and tribes over a potentially unlimited amount of land hangs in the balance.

The first question concerns whether Congress temporally limited the Indian tribes included in the Indian Reorganization Act, 25 U.S.C. §461 *et seq.*, to those recognized and under federal jurisdiction at the time of passage of the Act. The operative language, contained at 25 U.S.C. §479, as restated by this Court, expressly limits tribal inclusion in the IRA to "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction." *United States v. John*, 437 U.S. 634, 649 (1978) (bracket by Court). The text of Section 479 has not changed since passage of the IRA in 1934.

[1] During the First Circuit proceedings, eleven states from Alaska to Alabama, and several dozen tribes from across the country, participated through extensive briefing and oral argument.

To overcome the effects of a previous federal allotment policy (not applicable to the Narragansetts) by which certain Indian tribes lost their land, the IRA allows the federal government to take land into trust, thereby severely impairing State jurisdiction over that land. On trust land, states are precluded from exercising fundamental attributes of their sovereignty, including state and local taxation, zoning and regulation of land. The Narragansett Indian Tribe, unlike over 250 other Indian tribes, was neither recognized by the federal government nor under federal jurisdiction in 1934. For some Indian tribes recognized after the IRA, Congress has enacted separate legislation to allow certain land to be taken into trust, and for others it has not.

In addition to this Court's opinion in *John*, both the Fifth and Ninth Circuits have concluded that the IRA is limited to tribes recognized and under federal jurisdiction in 1934. Review of this case is essential to resolve both the newly created Circuit split and to clarify this Court's conclusion in *John* for the benefit of states and tribes across the country. Under the First Circuit's opinion, the Secretary is now empowered to take land into trust under the IRA not only for Indian tribes recognized by the federal government at the time of its passage, and individual tribes for whom Congress expressly authorized trust after 1934, but also for the hundreds of tribes recognized by the federal government long after the IRA became

law.[2] The petition should be granted so this Court can determine whether this unprecedented expansion is authorized by the 1934 Act.

The second question concerns whether the extinguishment provisions of the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §1701 *et seq.*, foreclose Indian country in Rhode Island. They do not foreclose Indian country if, as the First Circuit held, Indian interests in land (including aboriginal title) are confined to a mere fee simple interest. The extinguishment provisions, however, definitively foreclose Indian country if, as this Court in *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and the Second and Ninth Circuits have concluded, Indian interests in land include a broader sovereignty component.

The answer is important here, and in many other states, where Congress has extinguished aboriginal title and all Indian claims based on interests in or rights involving land. Given the number of trust acquisitions for tribes, the amount of land involved, the resulting ouster of state jurisdiction and the potential use of trust land for activities otherwise prohibited, regulated or taxed under state law – as well as *Sherrill* and the Circuit split – this question warrants review. This Court must clarify whether

[2] Today, there are nearly 600 Indian tribes recognized by the federal government. The First Circuit's novel interpretation of 25 U.S.C. §479, therefore, would more than double the number of tribes eligible for jurisdiction-stripping trust without any act of Congress.

Indian interests in land include a sovereignty component such that a congressional extinguishment of those interests (as in the Settlement Act) necessarily forecloses any assertion of Indian sovereignty thereon, including the assertion of Indian territorial sovereignty arising from trust. In his separate dissent, Judge Selya plainly set forth the need for review: "The controversy that divides our court today is vexing and of paramount importance to both the State and the Tribe. Thus, the issue – as well as the underlying principles of Indian law – doubtless would benefit from consideration by the Supreme Court. That is a consummation devoutly to be wished." 497 F.3d at 52. (Selya J., dissenting). App.80-81.

The third question presents a constitutional challenge to Section 465 of the IRA, which authorizes the Secretary – "in his discretion" – to acquire property in trust "for Indians." This standardless delegation by Congress has evaded this Court's review on several prior occasions. If the Constitution's nondelegation doctrine has any continued vitality, the IRA delegation cannot stand. Because of its jurisdictional importance, the issue will continue to arise in the lower courts until this Court resolves it.

The questions presented by this petition must be confronted so that this Court may determine whether a fundamental jurisdictional shift from states to Indian tribes is authorized by law.

STATEMENT OF THE CASE

Historical Background

In 1934, the Narragansett Indian Tribe – like a number of other tribes in New England – was neither federally recognized nor under the jurisdiction of the federal government. *See* Letters from the Department of the Interior to Narragansett tribal leaders between 1927 and 1937 expressly disavowing any federal jurisdiction over the Narragansett Indians. App.144-147.[3] Indeed, the Tribe did not receive federal recognition until 1983. *Carcieri v. Kempthorne,* 497 F.3d 15, 23 (1st Cir. 2007). App.11.

In 1975, the Tribe brought two lawsuits against the State, the Town of Charlestown and some Charlestown land owners to recover 3,200 acres based upon ancient aboriginal title to the Tribe's former colonial reservation (the "Lawsuits"). The Tribe argued its land had been sold without congressional approval as required by the Indian Nonintercourse Act, 25 U.S.C. §177, and that, accordingly, the transfer of land was null and void. *Id.* App.10. The 31 acre housing site that is the subject of this litigation

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[3] *See also* William W. Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 332 (1990) (discussing the unrecognized status of several New England Indian tribes, including the Narragansetts: "Until the 1980's, however, none of these tribes ever existed in the cognizance of the United States: they were unacknowledged, unserviced, nonentities *vis à vis* the federal government.").

(the "Parcel") was part of the 3,200 acres over which the Tribe asserted aboriginal title in the Lawsuits. *Carcieri v. Norton,* 290 F.Supp.2d 167, 170-71 (D.R.I. 2003). App.126.

In 1978, the parties settled the Lawsuits and executed an agreement the terms of which were set out in a Joint Memorandum of Understanding signed by the State, the Tribe, the Town and others. Congress approved and codified this agreement in the Rhode Island Indians Claims Settlement Act, 25 U.S.C. §1701, *et seq.* App.148. The Settlement Act provided that the Tribe would receive 1,800 acres of land, half of which was donated by the State and the other half of which was purchased with federal funds (the "Settlement Lands"). Congress required the Settlement Lands to be permanently held by a state-chartered corporation in trust for the Tribe. In exchange, Congress extinguished the Tribe's aboriginal title to land throughout Rhode Island. 25 U.S.C. §1705(a)(2); §1712(a)(2). App.152-53; 159-60. Congress separately extinguished the Tribe's (or any successor in interest to the Tribe) ability to make any "claims" "based upon any interest in or right involving" land in Rhode Island. 25 U.S.C. §1705(a)(3); §1712(a)(3). App.152-54; 159-60.

In a separate section, Congress mandated that "the Settlement Lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. §1708(a). App.157. When Congress subjected the Settlement Lands to the State's civil and criminal laws and jurisdiction, it "largely abrogate[d] the Tribe's sovereign immunity"

and effected a surrender by the Tribe of "any right to operate the settlement lands as an autonomous enclave." *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16, 26, 30 (1st Cir. 2006)(en banc). The Settlement Lands were ultimately conveyed to the Secretary in trust for the Tribe. The Secretary took them subject to the full applicability of the State's civil and criminal laws and jurisdiction ("restricted trust"). The Parcel, although claimed in the Lawsuits, did not become part of the Settlement Lands; it was separately purchased by the Tribe's housing authority many years later.[4] *Carcieri,* 497 F.3d at 23. App.12.

On March 6, 1998, the State was notified that the Secretary intended to take the Parcel into federal trust for the Tribe. App.162-64. Because the proposed unrestricted trust acquisition would have resulted in an ouster of the State's civil and criminal laws and jurisdiction from the Parcel in favor of a federal and tribal jurisdictional regime – a jurisdictional first given that there has never been any sovereign territory for any Indian tribe in Rhode Island since statehood – the State, the Governor and the Town (collectively, the "State") immediately appealed. The Interior Board of Indian Appeals (IBIA) affirmed the Secretary's decision to convert the Parcel to trust.

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[4] There is no HUD or other federal requirement mandating that the Parcel be in trust for housing. There is also no tax avoidance rationale since the Tribe's housing authority is a tax-exempt non-profit agency under state law.

District Court Proceedings

The IBIA decision was, in turn, appealed to the United States District Court for the District of Rhode Island. There, the State argued, *inter alia*, that the Secretary was prohibited from converting land to trust for the Narragansetts under the IRA. First, by its own terms, the IRA is temporally limited to those tribes both federally recognized and under federal jurisdiction in 1934; since the Narragansetts were neither recognized nor under jurisdiction then, the Secretary cannot convert land to trust for their benefit under the IRA. Second, the Settlement Act independently precludes trust conversions by the Secretary for Indians in Rhode Island by extinguishing aboriginal title and all Indian claims "based upon any interest in or right involving" land in Rhode Island. Finally, the State argued that Section 465 of the IRA violates the Constitution by delegating a core legislative function – creating sovereign territory for an Indian tribe – to the full discretion of the Secretary without providing any standards for the exercise of that discretion. The District Court rejected all three arguments and entered final judgment in favor of the Secretary. *Carcieri v. Norton,* 290 F.Supp.2d 167 (D.R.I. 2003). App.84-136.

First Circuit Proceedings

The State appealed the District Court's final decision to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1291. There, a

three judge panel held that the Secretary could take land into trust for the Tribe in Rhode Island but declined to reach the issue of whether the lands so converted must remain subject to the State's civil and criminal laws and jurisdiction. *Carcieri v. Norton,* 398 F.3d 22 (1st Cir. 2005). The State petitioned for a rehearing because the panel failed to reach the central issue of the case: jurisdiction. Supplemental briefing was ordered by the court and, on September 13, 2005, the full court ordered the three-judge panel to rehear the case. The panel opinion was withdrawn and the judgment vacated. Order of September 13, 2005. App.137-38. The three-judge panel issued another decision which rejected the State's argument, permitted the Secretary to take the Parcel into trust and determined that the Parcel would be subject to federal and tribal law, rather than state law. This time, Judge Howard dissented arguing that the extinguishment provisions of the Settlement Act encompassed all Indian sovereignty claims, including those arising from trust. *Carcieri v. Norton,* 423 F.3d 45 (1st Cir. 2005) (Howard, J. dissenting) (rehearing opinion). The State petitioned for an en banc rehearing. The full court granted the State's petition, the rehearing opinion was withdrawn and the judgment based thereon once again vacated. The parties (as well as the scores of amici that were, by then, involved in the case) were permitted to file another round of supplemental briefs and the case was reheard, en banc, on January 7, 2007. Order of December 5, 2006. App.139-41.

After lengthy review, a now sharply divided court issued a decision, which affirmed the Secretary's ability to take land into unrestricted trust for Indians in Rhode Island. The court, noting that "[t]he State's challenges to the Secretary's authority under the IRA and the Constitution have national implications that reach beyond Rhode Island" rejected each of the State's defenses to the Secretary's trust acquisition. *Carcieri v. Kempthorne*, 497 F.3d 15, 21 n.2 (1st Cir. 2007)(en banc). App.7. First, it determined that the "recognized in [1934] tribe" limitation contained in Section 465 of the IRA is "ambiguous" and, having injected ambiguity, accorded the Secretary's complete deference in construing the 1934 Act as applying to any and all federally recognized tribes, regardless of the date of recognition. *Id.* at 26-35. App.17-37.

On the State's argument that the later-enacted Settlement Act's extinguishment of aboriginal title and Indian interests in land separately prohibited trust acquisitions, the court was sharply divided. Both the majority and dissenters agreed on the obvious – that the Secretary's acquisition will divest the State of fundamental aspects of its sovereignty over land so acquired, while at the same time granting the Tribe broad territorial sovereignty there. The four-judge majority narrowly confined the scope of Indian claims extinguished by Congress to "traditional property claims." As a result, the majority concluded that the Settlement Act did not prohibit the ouster of state sovereignty and the concomitant imposition of Indian sovereignty that are the hallmarks of unrestricted

trust. In the majority's view, Indian claims of sovereignty over land simply are not the type of claims extinguished by Congress in the Settlement Act. *Id.* at 34-39. App.40-44.

The dissenters, by contrast, viewed the extinguishment provisions broadly. They argued that Congress intended to extinguish claims raised by "Indians *qua* Indians" and that the ouster of state jurisdiction over land and the establishment of Indian territorial sovereignty there are *quintessential* Indian land claims. *Id.* at 49. App.74-75. They also pointed to the anomalous result yielded by the majority opinion: that on the Settlement Lands – the heart of the Tribe's ancestral home – Congress requires that the Tribe be subject to the State's civil and criminal laws and jurisdiction while allowing the Secretary to grant the Tribe full territorial sovereignty outside of them. *Id.* at 49-50. App.75-76.

Finally, the court dismissed the State's non-delegation claims. Instead of determining for itself, however, whether the language of Section 465 of the IRA sets forth sufficiently intelligible principles to guide the Secretary's trust acquisitions, the court merely relied on a second-hand recitation of the legislative history of the IRA and this Court's historical disinclination "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 42-43. App.57-59.

Shortly after the en banc decision was issued, the State filed a Motion for a Stay of Mandate. Recognizing the impact of the case, both in Rhode Island and nationwide, the First Circuit stayed its mandate "pending a resolution of the petition by the United States Supreme Court." App.82-83.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S APPLICATION OF THE IRA TO A TRIBE NOT BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934 CONFLICTS WITH OPINIONS OF THE FIFTH AND NINTH CIRCUITS AND THIS COURT

The First Circuit held that the IRA applies to a Tribe neither federally recognized nor under federal jurisdiction in 1934. *Carcieri*, 497 F.3d at 26-35. App.17-37. It did so on the ground that the applicable statutory test is "ambiguous" and therefore that under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), it was "permissible" for the Secretary to interpret "now" when used by Congress in 1934 to mean not only at the time of passage of the Act, but also any point in the future. 497 F.3d at 30. App.29.

In declining to apply the IRA's plain language as a temporal limitation,[5] the First Circuit is not only wrong, but is in conflict with the decisions of two sister circuits, *United States v. Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) and *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). Moreover, the First Circuit's holding is contrary to the conclusion of this Court in *United States v. John*, 437 U.S. 634 (1978).

Each of these cases hold that the IRA, on its face, does not apply to Indians or tribes who were not both federally recognized and under federal jurisdiction as of 1934. The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. §465. App.142. For the purpose of Section 465:

> [t]he term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on

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[5] As this Court also noted in *Chevron*, 467 U.S. at 842-43, where Congress has plainly expressed its intent "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent."

> June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all of the persons of one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. §479 (emphasis added). App.143.

In *United States v. John*,[6] this Court set forth the applicable statutory test necessary for a tribe, such as the Narragansetts, to be included in the IRA absent a later act of Congress. The IRA includes:

1) "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction," or

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[6] Since its passage in 1934, other than the Mississippi Choctaws in *John*, this Court has never been called upon to interpret the applicability of the IRA to a tribe. That would be in part because for at least the first forty (40) years after passage of the IRA, the Secretary at no time attempted to take land into trust under the 1934 Act for any tribe not recognized and under federal jurisdiction in 1934. Theodore Taylor, Bureau of Indian Affairs, "Report on Purchase of Indian Land and Acres in Trust 1934-1975," Appendix A3, *microformed at* Suffolk Univ. Sch. of Law Microforms Drawer 162, Title 3322. Since then, the Secretary has only taken land into unrestricted trust from somewhere between one to no more than a handful of tribes that did not meet the "recognized [in 1934] tribe" test.

2) "all other persons of one-half or more Indian blood."[7]

437 U.S. at 649 (bracket by Court).

John was decided four years after the Fifth Circuit's own analysis of whether the IRA was temporally limited. In *United States v. Tax Comm'n*, 505 F.2d 6[illegible], 642 (5th Cir. 1974), the Fifth Circuit squarely held that: "The language of [25 U.S.C. §479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words '*any recognized Indian tribe now under Federal jurisdiction*' and the additional language to like effect." The First Circuit nowhere confronts this contrary holding of a sister circuit.

Like the Fifth Circuit, the Ninth Circuit has also weighed in on the question of whether the 1934 Act contains a temporal limitation. After a detailed discussion of the text and history of Section 479, the District

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[7] Immediately after citing Section 479, this Court further confirmed the temporal limitation of the Act, stating that "[t]here is no doubt that persons of this description [half bloods] lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior *at the time the Act was passed*." 437 U.S. at 650 (emphasis added). This separate "Indian blood" test for IRA inclusion is not at issue in this case. The Secretary has proposed to take the Parcel into trust "for the use and benefit of the Narragansett Indian Tribe of Indians of Rhode Island," and not individual Indians. App.162. The Narragansetts have never claimed, nor could they claim, that tribal members today or at the time the 1934 Act was passed met the half-blood test.

Court interpreted the "recognized [in 1934] tribe" test as a clear temporal limitation. *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1221 & n.10 (D. Haw. 2002).

On appeal, the Ninth Circuit affirmed, holding that "by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. There were no *recognized* Hawaiian Indian tribes *under federal jurisdiction in 1934*, nor were there any reservations in Hawaii." *Kahawaiolaa*, 386 F.3d at 1281 (emphasis added). This Court denied certiorari. 545 U.S. 1114 (2005). Once again, the First Circuit ignored this contrary conclusion.

The First Circuit did, however, mention this Court's opinion in *John*. Referring to *John's* discussion of the question presented here as "musings" which "fall short even of being dicta," the First Circuit dismissed it in a single paragraph. 497 F.3d at 28. App.22-23. *John*, however, cannot be so cavalierly discarded.[8] The First Circuit correctly notes that *John* was decided on a "different clause" for IRA eligibility; namely, that the Choctaw Tribe had members "of one-half or more Indian blood," and not on the ground that the Tribe qualified under Section 479 regardless of the date it was recognized by the federal government.

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[8] As the First Circuit itself correctly holds, "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *Rossiter v. Potter*, 357 F.3d 26, 31 n.3 (1st Cir. 2004).

497 F.3d at 27-28. App.22. That, however, hardly makes this Court's conclusion on Section 479's temporal limitation dicta or worse. That is because nowhere in *John* did this Court express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in *Tax Comm'n.*, that the language of Section 479 "positively dictates that tribal status is to be determined as of June, 1934." 505 F.2d at 642. Indeed, this Court itself affirmed Section 479's temporal limitation by expressly noting the "recognized [in 1934] tribe" requirement.[9]

By not reversing the Fifth Circuit's earlier conclusion that the 1934 Act was temporally limited to certain tribes, and resting its reversal on an unrelated alternative ground, this Court's interpretation of Section 479 – while it may fall just short of an outright holding – is in no way mere "musings" or an interpretation that "fall[s] short even of being dicta." 497 F.3d at 28. App.23. This Court's conclusion that a "recognized [in 1934] tribe" test exists in the 1934 Act – like that of the Fifth Circuit – has sustained precedential value.

John is supported by considerable additional evidence. First, Section 478 of the IRA mandated that

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[9] As such, if no member of the Choctaw Tribe possessed one-half or more Indian blood at the time of passage of the Act, this Court would have properly concluded that: 1) a "recognized in [1934] tribe test" was contained in Section 479; and 2) the Choctaw Tribe did not pass that test. That same conclusion applies to the Narragansetts here.

the Secretary call for an election by existing reservation Indians on whether to opt out of the IRA "within one year of June 18, 1934," *not* within a year some unknown future recognition of a tribe or reservation. The plain language is entirely inconsistent with the notion that the IRA applied to tribes not then recognized and under federal jurisdiction. *See City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 161 n.6 (D.D.C. 1980) ("That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

Second, in order to determine which tribes were eligible to opt out of the 1934 Act, the Secretary had to determine which tribes were *in* the Act. Therefore, "a list of 258 tribes was made of all those eligible to participate in voting to reorganize under the IRA or not. As a practical matter, this list can be said to be the constructive 'list' of Indian tribes recognized by the United States in 1934." Quinn, *Federal Acknowledgment*, 34 Am. J. Legal Hist. at 356; *see also* Theodore H. Hass, *United States Indian Service, Ten Years of Tribal Government Under I.R.A.* (1947), Table A at http://thorpe.ou.edu/IRA/IRAbook (Interior-commissioned report detailing which tribes voted to accept or reject the IRA with election dates). The contemporaneous compilation of tribes eligible for IRA inclusion or opt out is further support for *John's* temporal limitation.

Third, when Congress wished to include future events subsequent to passage of the IRA it did so expressly. Section 472 of the IRA, for example, made

itself applicable to employment positions maintained "now *or hereafter*." (emphasis added). The absence of the words "or hereafter" in Section 479 precludes an interpretation that effectively reads those words into that section.

Fourth, on numerous occasions since 1934, Congress has passed specific acts including additional tribes within the scope of the IRA or granting them trust land.[10] The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is inconsistent with the First Circuit's view that all tribes, regardless of the date of recognition, are automatically included in the IRA as soon as they become federally recognized.

Certiorari is necessary because of the conflict between the First Circuit on the one hand and the Fifth and Ninth Circuits and this Court on the other, over the important question of whether the IRA's "recognized [in 1934] tribe" requirement nonetheless "allow[s] trust acquisitions for tribes that" become "recognized and under federal jurisdiction" decades after 1934, so long as the tribe is recognized and

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[10] *See, e.g., Hoopa-Yurok Settlement Act*, 100-580 (1988)("The Indian Reorganization Act of June 18, 1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . "); *Coquille Restoration Act*, Pub. L. No. 101-42 (1989)("Indian Reorganization Act Applicability. The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members."). Although Congress passed two specific laws for the Narragansetts (the Settlement Act in 1978 and an amendment to the Act in 1996), it has never added them to the scope of the IRA.

under federal jurisdiction "at the time of the trust application." 497 F.3d at 30. App.29.

II. THIS COURT SHOULD DETERMINE WHETHER CONGRESSIONAL EXTINGUISHMENTS OF ABORIGINAL TITLE AND INDIAN INTERESTS IN OR RIGHTS INVOLVING LAND FORECLOSE INDIAN TERRITORIAL SOVEREIGNTY

When Congress passed the Settlement Act, it implemented a specially negotiated agreement that gave the Tribe a viable land base and a locus for the exercise of its retained sovereignty over its members. The Settlement also gave the Tribe (through a state-chartered corporation established for the purpose), and not the federal government, control over the management and disposition of the Settlement Lands. In return, the State bargained for and obtained a guarantee that its laws and jurisdiction – and not that of the federal government or any Indian tribe – would continue to apply throughout the State, including on the Settlement Lands.[11] For its part, the federal government was relieved of any further land-based duties and liabilities to the Tribe, foreclosing the conventional dependency that had characterized Indian relations with the United States. The effect of

[11] *Narragansett Indian Tribe*, 449 F.3d 16 (interpreting the guarantee of continuing state civil and criminal jurisdiction in the Settlement Act as fully applicable on the Settlement Lands).

the Settlement Act was to establish an allocation of power that continued a long tradition of Narragansett independence from the federal government, left tribal sovereignty over its members and internal governance intact and permitted tribal lands to be subject to the regular application of state law – all in the heart of the Tribe's ancestral home.

The Settlement Act's extinguishment provisions ensure that the State's jurisdiction, and thus, its territorial sovereignty is preserved within its borders. First, Congress extinguished all aboriginal title throughout the State. 25 U.S.C. §1705(a)(2) (extinguishing Narragansett aboriginal title everywhere within the United States and all other tribes' aboriginal title within Charlestown). App.152-53; 25 U.S.C. §1712(a)(2) (extinguishing all other Indian tribes' aboriginal title in Rhode Island outside Charlestown). App.159-60.

Second, Congress effected an even broader, more powerful preclusion by extinguishing any claims by any tribe, including the Narragansetts, or any "successor in interest" against the State based upon "any interest in or right involving land" in Rhode Island. 25 U.S.C. §1705(a)(3) (extinguishing Narragansett Indian and successor rights and interests in land anywhere in the United States). App.152-54; 25 U.S.C. §1712(a)(3) (effecting precisely the same extinguishment of other tribes' land rights and interests in Rhode Island). App.159-60.

When the State and Tribe settled the Lawsuits and when Congress implemented that settlement, all Indian claims involving land in Rhode Island were eliminated, "whether monetary, possessory *or otherwise*." *Carcieri,* 290 F.Supp.2d at 170. (emphasis added) App.86. Indeed, the congressional record specifies that Congress was foreclosing "those claims raised by Indians *qua* Indians" but not "any claims of any Indians under any law generally applicable to Indians as well as non-Indians in Rhode Island." H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955. In other words, the Settlement Act extinguished *uniquely* Indian rights and interests in land. This Court must determine whether those uniquely–held Indian interests include a territorial sovereignty interest. If so, the Secretary cannot convert land to trust in Rhode Island because doing so would establish Indian territorial sovereignty–a result that Congress precluded in the Settlement Act.

1. Defining the Reach of Congressional Extinguishments of Indian Interests in Land is Critically Important to Settlement Act States

When the Secretary converts land to trust for Indians, Indian country may also be created[12] – the

[12] The First Circuit held that the Parcel automatically becomes Indian country once converted to trust, without any analysis of whether it meets the Indian country definition

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jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. Within Indian country, tribes possess broad authority – subject to federal limitations – to govern not only their own members, but also the land and non-members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. *See Alaska v. Native Village of Venetie,* 522 U.S. 520, 527 n.1 (1998); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332 (1983).

The conversion of land to trust for Indians has a profound and permanent jurisdictional impact on states, local communities and the public and is of particular significance in a tiny and densely populated state like Rhode Island. As an example, tribes enjoy immunity from state and local taxation on trust land. From a central location, 95% of Rhode Island's population of just over one million people is within half an hour's drive. Tax-advantaged Indian business enterprises at that location could seriously undermine state tax revenues that fund schools, roads and other critical infrastructure. Likewise, land taken into trust may be used for gaming purposes; Indian gaming from any location within Rhode Island will jeopardize another of the State's significant sources of

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contained in 18 U.S.C. §1151. Here, there is no dispute that the Parcel is intended to be used for Indian housing, and if so used, would constitute a "dependent Indian community" under 18 U.S.C. §1151(b).

revenue – its state-operated gaming facilities. Moreover, there is nothing – save secretarial discretion – that prevents virtually the entire state from being converted to Indian country through trust acquisitions. This is the case even though there has never been Indian country in Rhode Island in its entire constitutional history.

Whether the Secretary can reallocate territorial sovereignty from a state to a tribe through trust conversions, in the face of congressional extinguishments of aboriginal title and Indian rights and interests in land, is a question of obvious importance to Rhode Island. But that question also affects a host of other states – including some within the First Circuit – where Congress has passed Indian land claims settlement acts with similar extinguishment provisions.[13] Yet despite Congress' widespread use of these

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[13] *See, e.g.*, Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §1603(a),(b) (extinguishing aboriginal title in most of Alaska); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §1723(b) (extinguishing all aboriginal title in Maine) and 25 U.S.C. §1723(c) (extinguishing all Indian claims "based on any interest in or right involving" land in Maine); Massachusetts Indian Claims Settlement of 1987, 25 U.S.C. §1771b(b) (extinguishing aboriginal title of the Wampanoag of Gay Head); Mashantucket Pequot Indian Claims Settlement Act of 1983, 25 U.S.C. §1753(b) (extinguishing aboriginal title of the Mashantucket Pequots) and 25 U.S.C. §1753(c) (extinguishing any Pequot "interest in or right involving" land); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. §1775b(d)(1)(A) (extinguishing Mohegan aboriginal title) and 25 U.S.C. §1775b(d)(1)(B) (extinguishing any other Mohegan claims

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extinguishment provisions, this Court has never directly determined what Indian rights and interests in land are foreclosed thereby. Given the enormous jurisdictional consequences for both tribes and states arising out of trust acquisitions, there is a compelling need for guidance from this Court on the question.

2. The First Circuit's Restriction of Aboriginal Title to a Mere Fee Interest Conflicts with Opinions of the Ninth and Second Circuits – as Well as Teachings of this Court – Defining Aboriginal Title as Inclusive of a Sovereignty Interest

The critical question for this Court is whether congressional extinguishments of aboriginal title and Indian interests involving land prohibit trust under the IRA in Rhode Island. While acknowledging that acquiring the Parcel in trust would establish Indian territorial sovereignty there, the First Circuit held that the Settlement Act's extinguishment provisions simply do not reach sovereignty interests in land. Along the way, the majority reduced the scope of Indian title, rights and interests in land to a mere fee simple interest. As a result, it restricted the reach of Indian interests extinguished by Congress in the Settlement Act to "traditional property claims." *Carcieri*, 497 F.3d at 36. App.43. That cabined view of

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to lands in Connecticut, including any claim or right based on recognized aboriginal title).

Indian rights and interests in land is erroneous given the plain language of the Settlement Act, Congress' stated intent to extinguish every claim raised by "Indians *qua* Indians," (H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955) and the anomalous result yielded by the decision: that on the Settlement Lands – the heart of the Tribe's ancestral home – Congress requires that the Tribe be subject to the State's civil and criminal laws and jurisdiction while allowing the Secretary to grant the Tribe full territorial sovereignty everywhere else.

The majority's opinion is not merely wrong, although it surely is that. Its restrictive view of what interests make up aboriginal title conflicts with decisions of the Ninth and Second Circuits. These courts recognize what a majority of the First Circuit did not – that aboriginal title encompasses more than just a fee simple interest; it includes a sovereignty interest as well. Because the Ninth and Second Circuits both define aboriginal title as inclusive of a sovereignty interest, these courts would have found that a congressional extinguishment of aboriginal title forecloses Indian territorial sovereignty, including the sovereignty interest arising from trust. *Sherrill* adds robust support to this view.

The Ninth Circuit specifically recognizes that a claim of aboriginal title to land includes claims of sovereignty thereon. In *Native Village of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998), five Alaskan Native villages brought a claim against the United States asserting unextinguished

aboriginal title to a portion of the outer continental shelf (OCS). The Ninth Circuit rejected the aboriginal title claim on the ground that the tribes were making a prohibited "claim of *sovereign* right or title" over the OCS. *Id.* at 1095 (emphasis added). The Ninth Circuit held that since possession under a claim of aboriginal title would permit the tribes to exercise "regulatory power" over third parties (*i.e.*, sovereignty), such claims were inconsistent with federal interests in the OCS. *Id.* at 1096. Thus, unlike the First Circuit, the Ninth Circuit has determined that aboriginal title includes a claim of sovereignty over land. With this predicate firmly in place, the Ninth Circuit would necessarily conclude that an extinguishment of aboriginal title prohibits further claims of Indian territorial sovereignty like those arising from trust.

A recent opinion of the Second Circuit is in full accord. In *Western Mohegan Tribe v. Orange County,* 395 F.3d 18 (2nd Cir. 2004), the Mohegans claimed aboriginal title to land in ten New York counties. For the purpose of determining whether the Mohegan's claims could survive defendants' motion to dismiss on Eleventh Amendment grounds, the Second Circuit was required to analyze the nature of the Mohegan's aboriginal title claim. The Mohegans argued that aboriginal title claims are limited to certain usufructory rights. The Second Circuit, however, rejected that limited reading. Instead, it held that in asserting a claim of aboriginal title, the Mohegans were, *inter alia*, seeking a determination that the lands in question were not within the regulatory jurisdiction of the

state. *Id.* at 23. In other words, in asserting aboriginal title claims against the State of New York, the Second Circuit held that the Mohegans were, indeed, making claims to sovereignty over land there. Accordingly, the Second Circuit affirmed the District Court's dismissal of the Mohegan's claims.

The determination by both the Ninth and Second Circuits that aboriginal title includes a sovereignty interest rests on sound footing. This Court has "repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 (1980). Indeed, this Court's most recent discussion of aboriginal title strongly supports the conclusion of the Ninth and Second Circuit that territorial sovereignty is an inherent attribute of aboriginal title.

In *Sherrill*, the Oneida Indian Nation purchased fee title to two parcels of land within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to land within that historic reservation, the United States and the Oneida argued – just as the State does here – that the unification of fee title and aboriginal title permits the exercise of tribal "sovereign dominion" over the parcels. 544 U.S. at 213.

Crucially, the Oneida were not using aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida had purchased the parcels and owned them in fee. Instead, the *sole* reason for the assertion of aboriginal title was to

extend tribal sovereignty over the parcels by removing them from state jurisdiction (and its concomitant taxing power). If aboriginal title were nothing more than a fee simple interest in land, lacking sovereign jurisdictional import, this Court would have simply ended the case by holding that aboriginal title cannot effect an ouster of state laws. *Sherrill* instead agreed with the Oneida's core position (and that of the State here) that when an Indian tribe holds both the fee title and aboriginal title to land, it owns the land *and* may exercise *"present and future Indian sovereign control"* over the land. 544 U.S. at 219-20 (emphasis added). Thus, *Sherrill* accepts that aboriginal title is greater than a fee simple; it includes a sovereignty interest as well.

Finally, Congress itself has expressly recognized that aboriginal title is more than a mere fee interest in land. In 18 U.S.C. §1151, Congress defines "Indian country" as including "all Indian allotments, the Indian titles to which have not been extinguished." Since an Indian allotment is, itself, a fee interest in land (the fee being held by the United States for the first 25 years and then conveyed to the Indian allotee in fee simple absolute), the persistence of aboriginal title transforms the land into "Indian country." As such, Congress itself has determined that aboriginal title *makes* land Indian country. Conversely, it has also determined that the extinguishment of aboriginal title *precludes* Indian country.

Sherrill also discusses the proposition that the Oneidas may regain ancient sovereignty over land

through Section 465 trust. 544 U.S. at 220-21. The First Circuit holds that the Narragansetts can do the same. It is wrong. Unlike the Oneidas, the Narragansetts cannot reinvigorate their ancient right to territorial sovereignty because Congress in the Settlement Act has affirmatively eliminated their ability to assert that right. While the First Circuit holds that, in relation to the establishment of Indian territorial sovereignty in Rhode Island, the congressional extinguishment of aboriginal title is "beside the point" because "the IRA provides an alternative means of establishing tribal sovereignty over land," 497 F.3d at 36. App.42, quite the opposite is true. The legal fact that Congress extinguished Indian sovereign interests in land in Rhode Island *is* the point since that extinguishment is outcome determinative – preventing any "alternative means" of establishing Narragansett sovereignty over land (absent a separate act of Congress).

The Oneidas were not faced with a post-1934 act of Congress extinguishing their territorial sovereignty. The 1978 Settlement Act, however, does precisely that here with respect to the Narragansetts – thereby impliedly repealing the application of Section 465 of the IRA in Rhode Island. Had Congress passed the same type of act in New York as it did in Rhode Island, the Oneidas, like the Narragansetts, would be unable to use the 1934 Act to establish tribal sovereignty over their land.

If, as this Court, the Ninth and Second Circuits and Congress all hold, the right of an Indian tribe to

be sovereign over land is an inherent part of the aboriginal title estate, then a statewide congressional extinguishment of aboriginal title must be, as a matter of law and logic, preclusive of Indian territorial sovereignty there. Indeed, *Sherrill* compels this conclusion. Since trust, by definition, establishes Indian sovereign authority over territory (*Sherrill*, 544 U.S. at 221), trust is barred in Rhode Island by congressional extinguishment of aboriginal title. When the Settlement Act extinguished aboriginal title throughout the State, it necessarily placed a future limitation on the exercise of tribal sovereignty over land in Rhode Island, including on the Parcel.

3. The First Circuit's Opinion is Wrong

The First Circuit's decision to limit the reach of the Settlement Act's extinguishment provisions and, as a result, to permit the Secretary to create Indian country in Rhode Island for the first time in the State's constitutional history is "error – and error of the most deleterious kind." *Carcieri*, 497 F.3d at 51 (Selya, J. dissenting). App.80. The majority failed to appreciate a fundamental aspect of Indian land tenure: that Indian tribes are governments; they have special governmental rights and interests in land that conventional fee simple owners do not. *See* Felix S. Cohen, Handbook of Federal Indian Law, Chapter 9 at 472 (1982 ed.) (discussing the tribal estate as a unique form of collective property ownership with no known analog in Anglo-American property law).

Thus, when Congress extinguishes a tribe's interests in land, it extinguishes not only any fee interest but also any tribal governmental interest such as the right to exercise police power, the right to levy taxes, and the right to be free of state and local laws on the land. As noted in Judge Howard's dissent, Congress passed the Settlement Act for the purpose of extinguishing claims that could be raised "**by Indians qua Indians**." 497 F.3d at 49 (emphasis in original) *citing* H.R. Rep. 95-1453 (1978) *reprinted in* 1978 U.S.C.C.A.N. 1948, at 1955. App.74. Indian tribes have a unique and significant sovereignty interest in their land. The Settlement Act targeted – and extinguished – precisely that interest. Regardless of how this Court defines aboriginal title – inclusive of a property interest or not – there are other provisions in the Settlement Act that compel the conclusion that Congress meant to extinguish Indian claims of sovereignty over land, *particularly* those arising from trust.

First, even if the extinguishment of aboriginal title merely terminated a tribal right to possess land, a second, far broader extinguishment slams the door shut on any argument that any tribe may claim territorial sovereignty in Rhode Island. Sections 1705(a)(3) and 1712(a)(3) of the Settlement Act extinguish any claims by any tribe based upon any "interests in" or "rights involving" land in Rhode Island. App.152-54; 159-60. Under this second extinguishment, Indian tribes are precluded from making claims that tribal law, rather than state law, applies

on tribal land anywhere in the State because such assertions are claims of right (sovereignty) involving land in Rhode Island.

Second, the bar against claiming territorial sovereignty in Rhode Island applies not just to Indian tribes. The Settlement Act also independently bars any "successor in interest" from claiming "interests in" or "rights involving" land in Rhode Island on behalf of Indian tribes. 25 U.S.C. §1705(a)(3); §1712(a)(3). App.152-54; 159-60. When the Secretary takes land into trust for a tribe under Section 465 of the IRA, he becomes that tribe's "successor in [fee title] interest" and is, therefore, confronted with precisely the same bar faced by Indian tribes themselves. These sections separately prevent the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits an Indian tribe from doing directly: effecting an ouster of the State's jurisdiction over land in Rhode Island. In order to prevent such an ouster, the Act places a prospective limitation on the federal government's ability to divest state sovereignty by converting land into trust for Indians. The Secretary can no more assert a claim that the Parcel is Indian country than the Tribe can.

Finally, the Settlement Act bars the United States from any "further duties or liabilities" under the Settlement Act with respect to the Tribe. 25 U.S.C. §1707(c). App.156. Since the Settlement Act is a congressional implementation of a settlement of Indian *land* claims, this provision – to mean anything

at all – must mean that upon the discharge of the Secretary's duties specified in Sections 1704-1707, the Secretary has no further duties or liabilities to the Tribe concerning *land* in Rhode Island.

These crucial provisions of the Settlement Act – the extinguishment of aboriginal title, the further extinguishment of all Indian claims of rights and interests in land in Rhode Island, the barrier preventing the Secretary from making such claims on the Tribe's behalf and the ban preventing the Secretary from any further land-based duties or liabilities to the Tribe under the Settlement Act – all lead to one inescapable conclusion. The Settlement Act prohibits the Secretary from taking land into unrestricted trust in Rhode Island.

III. THE CONGRESSIONALLY DELEGATED AUTHORITY TO PROVIDE LAND "FOR INDIANS" CONTAINS NO GUIDANCE FOR THE SECRETARY'S DISCRETIONARY TRUST TAKING POWER

Federal, state and tribal sovereignty clash where Congress delegates complete discretion to the Secretary to take land into trust "for Indians" pursuant to 25 U.S.C. §465. App.142. The intrusion into state sovereignty that results from a trust conversion is profound and, if constitutional in the first instance, must be governed by a clear set of standards. As

states have loudly complained, Section 465 of the IRA contains no standards at all.[14]

The nondelegation doctrine is an underpinning of separation of powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. art. I, §1, and the "text permits no delegation of those powers." *Whitman v. American Trucking Assn. Inc.*, 531 U.S. 457, 472 (2001). Congress is therefore not permitted to abdicate or to transfer to other branches of government its essential legislative function. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

Delegating decision-making authority to agencies requires "Congress" *itself* to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform. . . ." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). A constitutionally sufficient "intelligible principle" is established "if Congress clearly delineates the general policy, the public agency which

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[14] *See, e.g., South Dakota v. Department of Interior*, 69 F.3d 878 (1995) *granted, vacated, remanded* 519 U.S. 919 (8th Cir. 1996); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S.Ct.38 (2006); *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S.Ct. 67 (2006); *see also United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000)(private party challenge to statute).

is to apply it, and the boundaries of the delegated authority." *Mistretta*, 488 U.S. at 371.

Section 465 of the IRA violates the nondelegation doctrine because it fails to lay down any principle at all, let alone an "intelligible" one. It provides no guidance and no ascertainable standards to test whether the will of Congress has been obeyed in providing land "for Indians."

What makes the total failure to provide any standards for the Secretary's exercise of discretion fatal is that the resulting trust acquisition precludes the state from exercising fundamental attributes of its sovereignty there.[15] That is because "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman* 531 U.S. at 475. Here, the broadest power – to provide land "for Indians" – is coupled with the broadest grant of authority – significantly impairing

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[15] While not important in this case, whether land taken into trust under Section 465 also constitutes Section 1151 Indian country is outcome determinative on the question of whether exclusive federal jurisdiction exists under the Indian Major Crimes Act, 18 U.S.C. §1153. *See John*, 437 U.S. 647-48 (only land within "Indian country" is subject to the Act and crimes thereunder are "within the exclusive jurisdiction of the United States."). Land taken into Section 465 trust is not automatically Indian country, *United States v. Stands*, 105 F.3d 1565, 1572 n.3 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1997), nor is it automatically a "reservation" under Section 467. Section 467 itself requires the Secretary to affirmatively "proclaim" a "reservation," thereby negating the idea that reservation status is automatic.

state jurisdiction. That combination is prohibited by the Constitution. *Whitman* requires that Congressional grants of broad authority be accompanied by "substantial guidance." *Id.* In light of the breadth of the trust taking power and its dramatic impact, the phrase "for Indians" falls far short of "substantial guidance."

In attempting to create an "intelligible principle" where none exists, the First Circuit looked to the legislative history of the IRA. *Whitman* prohibits this. Instead, *Whitman* held that "*Congress* must lay down *by legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 472 (emphasis added). Congressional reports and statements from the floor of Congress do not constitute a "legislative act."

In a footnote, the First Circuit claims that a resort to legislative history to divine an "intelligible principle" is warranted by *Mistretta*. *Carcieri*, 497 F.3d at 42 n.20. App.57. If Congress had actually enacted standards in Section 465 or elsewhere they could be fleshed out by reference "to the purpose of the [IRA], its factual background and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104 (1946). In *Mistretta*, the Court looked to the legislative history to add content to the factors provided in the statute itself. 488 U.S. at 376 n.10. Where there is no standard to begin with, however, no case holds that resort to legislative history can save a statute.

Finally, the First Circuit took the standardless delegation in Section 465 of the IRA to a level never taken by any circuit court. That is because the First Circuit found "both the text and context of" Section 479 "to be ambiguous" and that the "[legislative] history also does not clearly resolve the issue." *Carcieri*, 497 F.3d at 28. App.23. With respect to the definition of Indian for whom the "for Indians" principle would operate, the ambiguity was cited to allow the Secretary to more than double the number of tribes eligible for trust acquisition. It is simply not possible for Section 479 to be both "ambiguous" *and* to provide "substantial guidance" to the Secretary at the very same time.

This Court should take this opportunity to resolve the nondelegation challenge to Section 465 once and for all.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Governor Donald L. Carcieri
By His Attorney,

CLAIRE RICHARDS*
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor
for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

State of Rhode Island
By Its Attorney,

PATRICK C. LYNCH
Attorney General

NEIL F.X. KELLY*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284

Counsel for Petitioners
**Counsel of Record*

2007 WL 2069544

United States Court of Appeals, First Circuit.

Donald L. CARCIERI, in his capacity as Governor of the State of Rhode Island; State of Rhode Island and Providence Plantations, a sovereign State of the United States; Town of Charlestown, Rhode Island, Plaintiffs, Appellants,

v.

Dirk KEMPTHORNE,* in his capacity as Secretary of the Department of the Interior, United States; Franklin Keel, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of Interior, United States, Defendants, Appellees.

No. 03-2647.

Heard En Banc Jan. 9, 2007.
Decided July 20, 2007.

Appeal from the United States District Court for the District of Rhode Island, Hon. Mary M. Lisi, U.S. District Judge.

Claire Richards, Special Counsel, for appellant Donald L. Carcieri.

Stephen P. Collette and Stephen P. Collette & Associates on brief for National Coalition Against Gambling Expansion, amicus curiae.

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* Defendant Gale A. Norton has been substituted with Dirk Kempthorne. *See* Fed. R.App. P. 43(c)(2).

Neil F.X. Kelly, Assistant Attorney General, with whom Patrick C. Lynch, Attorney General, was on brief, for appellant State of Rhode Island.

Troy King, Attorney General for the State of Alabama, Talis J. Colberg, Attorney General for the State of Alaska, Richard Blumenthal, Attorney General for the State of Connecticut, Susan Quinn Cobb, Assistant Attorney General for the State of Connecticut, Lawrence G. Wasden, Attorney General for the State of Idaho, Paul J. Morrison, Attorney General for the State of Kansas, Jeremiah W. (Jay) Nixon, Attorney General for the State of Missouri, Wayne Stenehjem, Attorney General for the State of North Dakota, Larry Long, Attorney General for the State of South Dakota, John P. Guhin, Assistant Attorney General for the State of South Dakota, Mark L. Shurtleff, Attorney General for the State of Utah, and William H. Sorrell, Attorney General for the State of Vermont, on brief for the States of Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota, Utah, and Vermont, amici curiae.

Joseph S. Larisa, Jr., Assistant Solicitor for Indian Affairs, for appellant Town of Charlestown.

Elizabeth Ann Peterson, Attorney, Environment and Natural Resources Division, United States Department of Justice, with whom Thomas L. Sansonetti, Assistant Attorney General, Jeffrey Bossert Clark and Ryan D. Nelson, Deputy Assistant Attorneys General, William B. Lazarus, Judith Rabinowitz, and David C. Shilton, Attorneys, Environment and Natural

Resources Division, United States Department of Justice, and Mary Anne Kenworthy, Office of the Solicitor, United States Department of the Interior, were on brief, for appellees.

Ian Heath Gershengorn, with whom Sam Hirsch, Jenner & Block LLP, John Dossett, Riyaz A. Kanji, Kanji & Katzen PLLC, Tracy Labin, Richard Guest, and Native AmericanRights Fund were on brief, for National Congress of American Indians, Absentee Shawnee Tribe, Akiak Native Community, Cahto Tribe of the Laytonville Rancheria, Cheyenne River Sioux Tribe, Coeur d'Alene Tribe, Confederated Salish and Kootenai Tribes of the Flathead Nation, Confederated Tribes of the Warm Springs Reservation of Oregon, Eastern Pequot Tribal Nation, Eastern Shawnee Tribe of Oklahoma, Ely Shoshone Tribe, Fallon Paiute-Shoshone Tribe, Ft. McDermitt Paiute-Shoshone Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Inupiat Community of Arctic Slope (IRA), Kenaitze Indian Tribe, IRA, Kickapoo Tribe in Kansas, Lac Courte Oreilles Band of Lake Superior Chippewa, Lovelock Paiute Tribe, Lummi Nation, Moapa Paiute Band of the Moapa Indian Reservation, Modoc Tribe of Oklahoma, Narragansett Indian Tribe of Rhode Island, Native Village of Venetie IRA Tribal Government, Nez Perce Tribe, Oglala Sioux Tribe, Oneida Tribe of Indians of Wisconsin, Prairie Band of Potawatami Nation, Pueblo of Laguna, Pueblo of Santa Ana, Pueblo of Taos, Seminole Tribe of Florida, Shoshone-Paiute Tribes of the Duck Valley Reservation, Sisseton-Wahpeton Oyate of the

Lake Traverse Reservation, St. Regis Mohawk Tribe, Suquamish Tribe, Tanana Chiefs Conference, Te-Moak Tribe of Western Shoshone Indians, Tuolumne Band of Me-Wuk Indians, United South and Eastern Tribes, Inc., Washoe Tribe of Nevada and California, and Yomba Shoshone Tribe, amici curiae.

C. Bryant Rogers, Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP, Charles A. Hobbs, and Hobbs, Straus, Dean & Walker, LLP on brief for Mississippi Band of Choctaw Indians, amicus curiae.

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, SELYA, Senior Circuit Judge, LYNCH, LIPEZ, and HOWARD, Circuit Judges.

EN BANC OPINION

LYNCH, Circuit Judge.

The en banc court has convened to consider a series of issues concerning the relative powers of the federal Secretary of the Interior, the State of Rhode Island, and the Narragansett Tribe over a parcel of land taken into trust and designated for Indian housing. The case is in many ways a proxy for the State's larger concerns about its sovereignty vis-à-vis federal and tribal control over lands within the state.

In 1998, the Secretary of the Interior agreed to take into unreserved trust for the Tribe's benefit a 31- or 32-acre parcel in Charlestown, Rhode Island (the Parcel). Then-Secretary Gale Norton cited her powers under section 5 of the Indian Reorganization Act of

1934(IRA), 25 U.S.C. § 465. The Tribe had purchased the Parcel in 1991.

Under the Indian Commerce Clause of the Constitution, U.S. Const. art. I, § 8, cl. 3, Congress has plenary power to legislate on the subject of Indian tribes. *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). As a result, Congress may preempt the operation of state law in Indian country. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). Under section 5 of the IRA, Congress has authorized the Secretary "in his discretion" to acquire and take into trust for Indian tribes "any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The Secretary may take land into trust for these purposes, as was done here, without the consent of the State.[1]

The Secretary's acquisition of land into trust for Indians results in the land becoming "Indian country." 18 U.S.C. § 1151. Generally speaking, primary jurisdiction over land that is Indian country rests with the federal government and the Indian tribe inhabiting it, not with the state. *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 140 L.Ed.2d 30 (1988). To be more precise,

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[1] By contrast, the Indian Gaming Regulatory Act provides the State with a limited role in determining whether land is taken into trust for gaming purposes. *See* 25 U.S.C. § 2719(b)(1)(A).

> "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." When, however, state interests outside the reservation are implicated, States [sometimes] may regulate the activities even of tribe members on tribal land. . . .

Nevada v. Hicks, 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (citation omitted) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)).

Recognizing a conflict between state jurisdiction and the federal interest in encouraging tribal self-governance, the Secretary's regulations under the IRA provide that "none of the laws . . . of any State . . . limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property . . . shall be applicable" to land held in trust for a tribe by the United States. 25 C.F.R. § 1.4(a). This provision is subject to the Secretary's power in specific cases or areas to make applicable those local laws determined to be in the best interest of the Indian owners "in achieving the highest and best use of [the] property." *Id.* § 1.4(b).

Concerned over the loss of sovereignty over the Parcel and what it may portend for the future, the State, its Governor, and the town of Charlestown (collectively, the State), sued the Secretary of the

Interior, now Dirk Kempthorne, and the Regional Director of the Bureau of Indian Affairs (BIA), Franklin Keel, in federal court. *See Carcieri v. Norton*, 290 F.Supp.2d 167 (D.R.I.2003). Having exhausted administrative remedies, the State brought suit under the Administrative Procedure Act, 5 U.S.C. § 702, seeking review of the Secretary's decision to take the Parcel into trust. *Id.* at 169, 172.

The State's case asserts three major theories. First, the State argues that the IRA does not authorize the Secretary to take land into trust for any tribe, including the Narragansetts, that first received federal recognition after June 18, 1934, the effective date of the IRA. Second, the State argues that the 1978 Rhode Island Indian Claims Settlement Act (the Settlement Act), 25 U.S.C. §§ 1701-1716, restricts the Secretary's authority to place the Parcel into trust pursuant to the IRA. Third, the State argues that the Constitution prohibits this exercise of authority by the Secretary.[2]

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[2] The State's challenges to the Secretary's authority under the IRA and the Constitution have national implications that reach beyond Rhode Island; accordingly, ten states and the National Coalition Against Gambling Expansion have filed amicus briefs in support of Rhode Island. Similarly, numerous tribes and tribal organizations have filed amicus briefs in support of the Secretary. We acknowledge the able assistance provided by the amici curiae states and National Coalition Against Gambling Expansion on behalf of the State, and amici curiae National Congress of American Indians, individual Indian tribes and tribal organizations, and the Mississippi Band of Choctaw Indians on behalf of the Secretary.

As to the IRA, the State argues that the Narragansetts do not meet the definition of "Indian" contained in 25 U.S.C. § 479. The pertinent definition recognizes, inter alia, "all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). The State reads "are members . . . now under Federal jurisdiction" to plainly and literally mean the 1934 effective date of the IRA. The State thus contends that the Secretary has no authority under the IRA to take land into trust for any tribe that was not federally recognized in 1934. As a result, the State argues, the Secretary is precluded entirely from placing the Parcel into trust for the Narragansetts, who were not recognized as a tribe until 1983.

Next, the State argues that the terms of the Settlement Act preclude the Secretary from placing the Parcel into trust because the Settlement Act is a later specific act of Congress that must be read to have explicitly and implicitly cabined the Tribe's and the Secretary's power as to the Parcel. The State argues that the Settlement Act bars the imposition of any trust. The State's fallback position is that any trust must be restricted by the terms of the Settlement Act so that it is clear that state and local law apply to the Parcel, just as they do to the settlement lands.

Finally, the State asserts various constitutional theories, with the common underpinning that the placing of the Parcel into trust violates the State's sovereignty. The State argues that the Indian

Commerce Clause does not authorize the Secretary's exercise of power and that the exercise violates the Tenth Amendment, as well as the Enclave and Admissions Clauses of the Constitution. The State also argues that section 5 of the IRA, 25 U.S.C. § 465, constitutes an unconstitutional delegation of legislative authority.

We hold that the language of 25 U.S.C. § 479 does not plainly refer to the 1934 enactment date of the IRA. We find that the text is sufficiently ambiguous in its use of the term "now" that the Secretary has, under the *Chevron* doctrine, authority to construe the Act. We reject the State's claim that we do not owe deference to the Secretary's interpretation because he has inconsistently interpreted or applied section 479. The State's evidence of inconsistency is mixed and is not persuasive. The Secretary's position has not been inconsistent, much less arbitrary. The Secretary's interpretation is rational and not inconsistent with the statutory language or legislative history, and must be honored.

Likewise, the Settlement Act neither explicitly bars by its terms the Secretary's actions, nor implicitly repeals or constrains the Secretary's authority under the IRA to place land into trust for the Tribe. While the State apparently failed to anticipate this particular problem at the time of the settlement, the Settlement Act did specifically contemplate the event of federal recognition of the Tribe and did not restrict the Secretary's power, should the Tribe be recognized, to take into trust land outside of the settlement

lands. We are not free to reform the Act. If aggrieved, the State must turn to Congress.

The State's arguments based on allocations of power under the U.S. Constitution also do not prevail. They do, however, underscore the seriousness of the State's concern about the abrogation of state sovereignty at stake here.

I.

In order to understand the nature of the controversy and the consequences of this decision, a brief recounting of the history of relations between the State and the Tribe is required. Further background can be found in the district court's opinion, *Carcieri,* 290 F.Supp.2d 167, as well as the opinions previously issued in the decades-long disputes between the State and the Tribe, *see Narragansett Indian Tribe v. Rhode Island (Narragansett III),* 449 F.3d 16 (1st Cir.2006) (en banc); *Narragansett Indian Tribe v. Narragansett Elec. Co. (Narragansett II),* 89 F.3d 908 (1st Cir.1996); *Rhode Island v. Narragansett Indian Tribe (Narragansett I),* 19 F.3d 685 (1st Cir.1994).

In 1880, the State acquired the majority of the Tribe's lands. In 1934, the Tribe organized as a state-chartered corporation. In 1975, the Tribe sued to recover its lands, arguing that the State had acquired the lands in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177. The Tribe claimed that this violation rendered void the transfer of title to the lands.

This cloud on title prompted the State to enter into settlement negotiations with the Tribe, which led in 1978 to an agreement embodied in a Joint Memorandum of Understanding (JMOU). Under the JMOU, the Tribe would receive 1800 acres of "settlement lands," half of which were provided by the State and half of which were purchased with federal funds. The State agreed to create an Indian-controlled corporation to hold the settlement lands in trust for the Tribe, to exempt the settlement lands from local taxation, and to help secure the federal legislation necessary to implement the agreement. In exchange, the Tribe abandoned its claims of aboriginal title and its claims to lands in the state other than the settlement lands.

In turn, Congress approved and codified the agreement in the Settlement Act. The Settlement Act provided that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." *Id.* § 1708(a).

Five years later, in 1983, the Secretary granted the Tribe official federal recognition. *See* Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (Feb. 10, 1983). Following that recognition, in 1985, Rhode Island amended the pertinent state statute to permit the conveyance of the settlement lands directly to the Tribe, explicitly preserving the State's jurisdiction over the settlement lands, consistent with the Settlement Act, 25 U.S.C. § 1708(a). *See* R.I. Gen. Laws § 37-18-13(b). The holding company

conveyed the settlement lands to the Tribe, and three years later, the Tribe conveyed the settlement lands to the BIA as trustee. The trust deed confirmed the application of state law to the settlement lands, as provided in 25 U.S.C. § 1708(a). The BIA continues to hold the settlement lands in trust for the Tribe, subject to this congressionally-enacted restriction that state law applies. *See Narragansett I,* 19 F.3d at 689, 695 n. 8. Significantly, in our earlier en banc decision in *Narragansett III,* we held that the language of section 1708(a) trumped any residual tribal sovereignty over the settlement lands, under which the Tribe had refused to comply with certain state laws.[3] *See* 449 F.3d at 26.

Then, in 1991, the tribal housing authority purchased the Parcel in fee simple, acquiring title through purchase from a private developer. The Parcel was part of the Tribe's aboriginal lands claimed in the 1976 lawsuit. Under the Settlement Act, the Tribe had thus relinquished aboriginal title to the Parcel, but the Parcel is not part of the 1800 acres of settlement lands. It is adjacent to the settlement lands, across a town road. In 1992, the Housing Authority transferred the Parcel to the Tribe with a deed restriction that the Parcel be placed in trust with the BIA for the purpose of providing housing.

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[3] In "an abundance of caution," we recognized that the Tribe may still possess some autonomy in local government matters such as membership rules, inheritance rules, and regulation of domestic relations. *Narragansett III,* 449 F.3d at 26.

A dispute soon arose over whether development of the Parcel had to comply with local law. The Tribe began construction on the planned housing project without obtaining a building permit from the Town or the State's approval of the individual sewage disposal systems. The Tribe essentially took the position that once it had purchased the Parcel, the land had become tribal land, and the Tribe's inherent sovereignty meant that the Parcel was exempt from local law. The State disagreed and filed suit in federal court to enjoin the Tribe. *See Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F.Supp. 349 (D.R.I.1995). Ultimately, the Tribe lost that litigation.[4] *See Narragansett II*, 89 F.3d at 922.

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[4] The Housing Authority was a duly recognized Indian housing authority and was given HUD funds to finance the purchase of the property and the construction of approximately 50 units of housing. *See* Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ff (*repealed by* Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243).

The district court found the proposed housing project could be detrimental to coastal and groundwater resources, but also held that the Parcel was a "dependent Indian community" within the meaning of 18 U.S.C. § 1151(b) and therefore partially denied injunctive relief. *Narragansett Elec. Co.*, 878 F.Supp. at 355-57, 366. On appeal, this court held that the land for the housing project was not a "dependent Indian community" because federal ownership of the land and federal action to "set aside" the land were lacking. *Narragansett II*, 89 F.3d at 921-22. Thus, the Parcel could not be considered Indian country under 18 U.S.C. § 1151(b), and the housing project being constructed on the site was not exempt from state and local building and zoning restrictions. Accordingly, this court reversed the district

(Continued on following page)

The Tribe had sought to solve the issue of the applicability of state law to the Parcel by applying to the Secretary in 1993 to have the Parcel taken into trust under section 5 of the IRA. The Secretary's determination of whether to do so was stayed pending the resolution of the federal court litigation. After the litigation was resolved against the Tribe by this court in 1996, *id.* at 922, the Tribe submitted a second application to the Secretary.

The Tribe filed this updated application with the Secretary in July 1997. In determining whether to take lands into trust, the Secretary follows a regulatory process set forth at 25 C.F.R. part 151, which requires consideration of several factors. If, as here, the land is off reservation, additional criteria apply. *See* 25 C.F.R. § 151.11. Generally, the farther from a reservation the land is, the greater the scrutiny the Secretary gives to the justification of anticipated benefits from the acquisition. *See id.* § 151.11(e); *see also* M.J. Sheppard, *Taking Indian Land into Trust,* 44 S.D. L.Rev. 681, 686 (1999).

On March 6, 1998, the BIA notified the State of the Secretary's intent to take the Parcel into trust for the Tribe. The State appealed the decision to the Interior Board of Indian Appeals (IBIA). The State argued, inter alia, that the Settlement Act prohibited this action by the Secretary, and that in taking the

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court and directed the district court to enter an order granting the injunction. 89 F.3d at 922.

land into trust without the State's consent, the Secretary had acted unconstitutionally. The IBIA affirmed the BIA's determination on June 29, 2000. *Town of Charlestown v. E. Area Dir., Bureau of Indian Affairs,* 35 I.B.I.A. 93, 106 (2000). It noted it had no jurisdiction over the claims of unconstitutionality.[5] *Id.* at 97.

The State then instituted this action in federal court. The district court, in a comprehensive decision, rejected the State's claims. *See Carcieri,* 290 F.Supp.2d 167. A divided panel of this court affirmed. *Carcieri v. Norton,* 423 F.3d 45 (1st Cir.2005). The en banc court granted rehearing and withdrew the panel opinion.

As described above and recounted in our en banc decision in *Narragansett III,* 449 F.3d at 18-21, for several decades the relationship between the Tribe and the State has been fraught with tension.

The State's short-term concerns in this case have to do with whether the particular project will conform with state and local law. The State also has concerns that once land is taken into trust, there will be very few mechanisms, other than negotiation with the Tribe or appeal to the Secretary's authority under 25

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[5] The IBIA rejected the State's insistence that the Secretary take account of the potential use of the Parcel for gaming purposes under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, calling such a possibility merely speculative. 35 I.B.I.A. at 103. The IBIA also concluded that there had been no violation of the Coastal Zone Management Act, 16 U.S.C. § 1451. 35 I.B.I.A. at 103.

C.F.R. § 1.4(b), by which the State may secure compliance with state and local laws.[6] The State fears that the Tribe will convert or otherwise use the Parcel, or any future parcels that might be acquired and put into trust, for income-producing activities in which it normally would not be permitted to engage under state law.

There has been federal litigation between state officials and the Tribe and its members over such activities. In 2003, the Tribe, seeking revenue, established on the settlement lands an Indian Smoke Shop that sold cigarettes without purchasing state cigarette stamps or collecting sales taxes then paid to the State, as required by state law. The State Police raided the smoke shop and initiated criminal prosecutions against tribe members. The Tribe sought a declaratory judgment in federal court asserting that

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[6] At oral argument, the Secretary indicated that although a tribe has civil regulatory jurisdiction over lands taken into trust, a state may seek to enforce its laws – to the extent they are not preempted by federal law – on trust lands either by agreement with the tribe or by seeking a determination in federal court that the State's interests with respect to enforcing a particular regulation outweigh the interests of the tribe and the federal government in fostering tribal self-government. *See Hicks*, 533 U.S. at 362 ("When . . . state interests outside the reservation are implicated, States [sometimes] may regulate the activities even of tribe members on tribal land."); *see also id.* at 364 (holding that state officers may execute on tribal lands process related to off-reservation violations of state law); *Confederated Tribes*, 447 U.S. at 151, 100 S.Ct. 2069 (explaining that the state could require Indian tribes to collect taxes on sales of cigarettes to non-Indians). That issue is beyond the scope of this opinion.

its control over the smoke shop was an inherent function of tribal sovereignty that survived the Settlement Act, despite the explicit language in section 1708(a). We rejected that claim en banc. *Narragansett III,* 449 F.3d at 30-31.

II.

A. *Standard of Review*

Technically, the claims at issue here are reviewed through the lens of an APA appeal under 5 U.S.C. § 706. Our review of such an appeal is de novo as to the district court's conclusions. *See Harvey v. Veneman,* 396 F.3d 28, 33 (1st Cir.2005). The underlying issues remaining in the case are statutory and constitutional. Statutory issues are reviewed de novo by the courts, but subject to established principles of deference to the administering agency. *Id.* Constitutional claims are reviewed de novo. *See Cousins v. Sec'y of Transp.,* 880 F.2d 603, 610 (1st Cir.1989) (en banc).

B. *The 1934 Indian Reorganization Act*

The State argues that the Secretary lacks authority to place the Parcel into trust under 25 U.S.C. § 465 since, under the definition of "Indian" in 25 U.S.C. § 479, that authority extends only to tribes that were both federally "recognized" and "under [f]ederal jurisdiction" on June 18, 1934, the effective date of the IRA.

The State presents a series of cascading arguments. First, the State argues that the plain language of section 479 is clear, and that under that plain language, the Tribe's status is measured as of 1934. The State further argues that its interpretation of the statute is the only one consistent with the purposes and legislative history of the Act. Thus, the State argues that because the statute is unambiguous, deference to the Secretary is unwarranted. In any event, the State argues that even if deference might have been warranted, the Secretary's current interpretation is not entitled to deference because it contradicts the Secretary's practice in the more than seventy years since the passage of the IRA.

1. Chevron *Analysis*

The Secretary has offered an interpretation of the IRA that permits trust acquisitions for tribes recognized and under federal jurisdiction at the time the request for a trust acquisition is made. A court reviewing an agency's interpretation of a statute that it administers engages in a two-step analysis. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We must first consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If congressional intent is clear, we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue," however, we must consider "whether the agency's

[interpretation] is based on a permissible construction of the statute." *Id.* at 843.

(a) *Whether Section 479 Is Ambiguous*

We begin our analysis with the statutory text. *Rucker v. Lee Holding Co.*, 471 F.3d 6, 9 (1st Cir.2006). The language at issue is that contained in 25 U.S.C. § 479, which provides:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

One might have an initial instinct to read the word "now" in the statute as the State does, to mean the date of enactment of the statute, June 18, 1934. Congress certainly has used the word "now" in this way. *See, e.g., Montana v. Kennedy,* 366 U.S. 308, 312, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961) (interpreting the word "now" in a reenactment of an earlier act to refer to the initial date of enactment).

Any such instinct quickly disappears upon further examination, however. This is not a case that can be resolved by looking to the plain meaning of the term "now" standing by itself. "Now" means "at the present time," but there is ambiguity as to whether to

view the term "now" as operating at the moment Congress enacted it or at the moment the Secretary invokes it. Indeed, Congress sometimes uses the word "now" to refer to a time other than the moment of enactment. *See Difford v. Sec'y of Health & Human Servs.*, 910 F.2d 1316, 1320 (6th Cir.1990) (interpreting the word "now" in a disability benefits termination provision to refer to the time of the hearing); *see also Pierce v. Pierce*, 287 N.W.2d 879, 882 (Iowa 1980) (noting that the phrase "now hav[ing] jurisdiction" in the Uniform Child Custody Jurisdiction Act "refers to the time of the filing of the petition"); *cf. Williams v. Ragland*, 567 So.2d 63, 65-66 (La.1990) (declining to interpret "now serving" in a mandatory judicial retirement provision to refer to the date of enactment). There also are other layers of ambiguity.

Given that the word "now" does not itself have a clear meaning, we must look to context. Here, the context is equivocal. On the one hand, the State points to 25 U.S.C. § 472, another provision of the IRA, which refers to "positions maintained, now or hereafter, by the Indian Office." The State argues that this use of "now" unambiguously refers to the date of enactment and that had Congress wanted to include later-recognized tribes in section 479, it would have similarly added the words "or hereafter."

On the other hand, the Secretary points out that section 479 itself specifies the date of "June 1, 1934" as the relevant date for determining eligibility based on "residing within the present boundaries of any Indian reservation." The Secretary thus counters that

had Congress wanted to require recognition of a tribe on the date of enactment, it would have specified that date, rather than using the term "now." *See also* 25 U.S.C. § 478 (requiring elections to be held "within one year after June 18, 1934"). Hence, "now" might mean "now or hereafter" or it might mean "June 18, 1934"; either would be consistent with some other part of the statute.

Policy does not provide an obvious answer either: each side has a plausible explanation that policy considerations favor its interpretation. The State argues that the principal, perhaps exclusive, concern of the 1934 statute was with remedying the perceived ills of the prior practice of allotment. *See Kahawaiolaa v. Norton,* 222 F.Supp.2d 1213, 1220 n. 10 (D.Haw.2002). Because the IRA ended allotments in 1934, *see* 25 U.S.C. § 461, they would not have affected later-recognized tribes, and hence there would have been no reason to include such tribes within the ambit of the statute.

The Secretary takes the view that the Act was intended not only to remedy past wrongs, but also to set a template for the future that would encourage the strength and stability of tribal communities. Based on this view, it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934. The Secretary's view is buttressed by the fact that the Act contains a number of provisions that have nothing to do with land consolidation. *See id.* § 472 (Indian

employment preference); *id.* § 476 (tribal organization).

The State reads *United States v. John,* 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), to indicate that the Supreme Court had an initial interpretation of the Act that coincides with the State's interpretation. It is unclear if the Court had any such interpretation, and in any event, we find that *John* is not controlling here. In *John,* the Fifth Circuit had found that the Mississippi Choctaws were not eligible for benefits under the IRA because the tribe had not been recognized in 1934. *United States v. John,* 560 F.2d 1202, 1212 (5th Cir.1977); *see also United States v. Miss. Tax Comm'n,* 505 F.2d 633, 642 (5th Cir.1974). The Supreme Court reversed, relying on a different clause in the statute and finding the tribe eligible for benefits under the IRA, but on the basis that its members were "persons of one-half or more Indian blood." 437 U.S. at 650.

Along the way, the Supreme Court stated:

> The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood."

Id. (alteration in original) (quoting 25 U.S.C. § 479 (1976)). The bracketed addition may be read to support the State's position, but the opinion contains no

analysis on this point, and the Court rested its holding on an entirely separate provision of the Act, one not at issue here. We are mindful that the Supreme Court's musings may warrant our attention. *See Rossiter v. Potter,* 357 F.3d 26, 31 n. 3 (1st Cir.2004); *but see* P. Leval, *Judging Under the Constitution: Dicta About Dicta,* 81 N.Y.U. L.Rev. 1249 (2006). In this case, however, given *John's* complete lack of analysis of the provision that concerns us, the relevant language seems to us to fall short even of being dicta.

Having found both text and context to be ambiguous, we turn to legislative history. Despite the State's arguments to the contrary, that history also does not clearly resolve the issue. Indeed, it suggests a reading of the phrase "now under federal jurisdiction" different from that offered by any of the parties, and is thus another source of ambiguity.

The congressional record establishes that the phrase "now under federal jurisdiction" was specifically added to the statutory definition of "Indian," a term defined separately from "tribe." *See* 25 U.S.C. § 479. The phrase was suggested by then-Commissioner of Indian Affairs John Collier in response to the concern that not all self-identified Indians deserved to benefit from the Act:

> The Chairman. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in

> northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.
>
> Senator O'Mahoney. If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner Collier. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

To Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S.2755 and S.3645 Before the S. Comm. on Indian Affairs, 73d Cong. 266 (1934).

Commissioner Collier offered the phrase as a limitation, but it is not clear whether it was intended as a temporal limitation. If the committee was concerned about the bona fides of an individual's status as an Indian and wanted to use the fact of federal

jurisdiction to measure those bona fides, then there would have been no reason to distinguish between those under federal jurisdiction in 1934 and those who later came under federal jurisdiction. In fact, the colloquy quoted above suggests that the committee sought to exclude some Indians already "under the supervision of the Government of the United States." If the purpose was to exclude those who might later be dropped from federal jurisdiction, it would make more sense to measure status as of the date benefits were sought, not as of the date of enactment of the statute.

Indeed, the colloquy and the remainder of the hearing suggest that the committee was focused on the issue of *individual* Indians who received benefits from the federal government on the basis of a limited heritage and without acting as a part of a tribal community. Earlier in the session, the chairman had raised the case of a "former Vice President of the United States," who was apparently receiving Indian benefits, asking, "Why should the Government of the United States be managing the property of a lot of Indians who are practically white and hold office and do everything else, but in order to evade taxes or in order to do something else they come in under the Government supervision and control?" *Id.* at 264.

Thus, although none of the parties have raised this, it may well be that the phrase "now under federal jurisdiction" was intended to modify not "recognized Indian tribe," but rather "all persons of Indian descent." So interpreted, the purpose of the

phrase might well have been to grandfather in those *individuals* already receiving federal benefits, but to otherwise insist that in the future, only individuals with at least one-half Indian blood would qualify. In that case, the limitation may well have been a temporal one, but the limitation, temporal or not, may have been intended to affect only the Secretary's authority to act for the benefit of an "individual Indian," not an "Indian tribe." *See* 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the *Indian tribe or individual Indian* for which the land is acquired. . . ." (emphasis added)). After all, while Congress may have been concerned about misdirecting resources to individuals who were only Indians in name, the same concern would not apply to federally recognized tribes, regardless of the date of federal recognition. In any event, this piece of legislative history amply supports the view that the statute is at least ambiguous and leaves room for administrative interpretation.

The other relevant piece of legislative history, heavily relied upon by the State, is the statement of Representative Edgar Howard, a cosponsor of the IRA:

> For purposes of this act, [the definitional section] defines the persons who shall be classed as Indian. In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth Indian blood. The latter provision is

> intended to prevent persons of less than one-fourth Indian blood who are already enrolled members of a tribe or descendants of such members living on a reservation from claiming financial and other benefits of the act. Obviously the line must be drawn somewhere . . .

Kahawaiolaa, 222 F.Supp.2d at 1220 n. 10 (emphasis omitted) (quoting Congressional Debate on Wheeler-Howard Bill (1934) *in* III *The American Indian and the United States* (1973)) (internal quotation marks omitted).

The State interprets the reference to "status quo" as supporting its view that federal recognition of tribes was essentially frozen for purposes of the IRA in 1934. This seems to be a misinterpretation of the quote, however. Representative Howard did not say that the Act would "maintain" or "preserve" the status quo; rather he stated that the Act would "recognize" it. Moreover, the quote refers not to Indian tribes, but to "reservation Indians." Thus, in context, this sentence is more likely a reference to that portion of the definition of an Indian, not at issue here, that covers "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479. This provision, with its explicit reference to 1934, covered those people of Indian descent then living on a reservation, without regard to whether they might independently qualify as Indians

under the Act. In that sense, the definition accepted and "recognized" the status quo of the reservations.

Thus, we find from the text, context, and legislative history that section 479 is at least ambiguous as to whether the phrase "now under federal jurisdiction" disqualifies tribes that were federally recognized after 1934, such as the Narragansett Tribe, from the benefits of the IRA.[7]

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[7] We reject two additional arguments offered by the State. First, it is not significant that 25 U.S.C. § 478 required tribes to opt out of the IRA by a fixed date, rather than one that depended on the date of recognition. In general, it is difficult to see why any tribe would opt out of a statute designed to benefit it, and the legislative history suggests that the provision was a legacy from earlier drafts of the bill that imposed duties on tribes in return for the benefits. *See* Hearing on S.2755 and S.3645, *supra*, at 262. As eventually passed, the only potential purpose of the election was to protect the rights of those that preferred the allotment system, an issue not relevant to tribes recognized after 1934.

Second, we hesitate to attach much weight to the fact that later Congresses have explicitly provided for the IRA to apply to newly recognized tribes. As the Supreme Court has recently cautioned again, the views of later Congresses carry little weight in determining the intent of the Congress that enacted the statute in question. *See Massachusetts v. EPA*, ___ U.S. ___, ___ & n. 27, 127 S.Ct. 1438, 1460 & n. 27, 167 L.Ed.2d 248 (2007). For the same reason, we do not take later enactments such as the 1994 amendments to section 476 to establish that Congress intended to make no distinctions among tribes in 1934. The parties have not pointed us to contemporaneous legislation that sheds further light on the issue.

(b) *Whether the Secretary's Interpretation Is Permissible*

As we have found the meaning of section 479 to be ambiguous, we must consider whether the Secretary's interpretation is "permissible." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. An interpretation is permissible if it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987). The Secretary's construction meets this test. As discussed above, it is reasonable and is consistent with the language and legislative history of the IRA. It also is consistent with the policy of the IRA, which, as we have indicated, may permissibly be viewed not only as intending to reverse the government's allotment policy, but also as affirmatively conferring benefits on Indians, including Indian employment preferences and a statutory right to organize and adopt governing documents.

We therefore reject the State's argument that the text and purposes of the IRA prohibit the Secretary's interpretation of section 479. Rather, we find that the Secretary's construction of section 479 as allowing trust acquisitions for tribes that are recognized and under federal jurisdiction at the time of the trust application is entitled to deference.

2. *Alleged Inconsistency of the Secretary's Interpretation*

The State makes a separate argument on which it heavily relies. It argues that the Secretary's interpretation of section 479 to allow trust acquisitions for tribes not federally recognized in 1934 represents a change in position as to the eligibility of tribes for IRA benefits, and that this interpretation therefore is not entitled to deference. The State relies particularly on historical practice, and says that the Secretary has never, or at least has hardly ever, identified as IRA-eligible a tribal entity that was not federally recognized in 1934 and does not meet the half-blood test. The evidence is limited with respect to whether the Secretary's interpretation of section 479 of the IRA has been consistent over the past seventy-three years.[8]

The consistency of the Secretary's construction is supported, though not directly, by a regulation promulgated by the Secretary in 1980. The regulation, found at 25 C.F.R. § 151.2, sets forth definitions that pertain to the regulations governing trust acquisitions. 25 C.F.R. § 151.2(b) defines a tribe that may be eligible for a trust acquisition as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and

[8] One difficulty arises from the fact that there seems to be no comprehensive list of tribes that were recognized and under federal jurisdiction as of June 18, 1934.

services from the Bureau of Indian Affairs." The regulation does not distinguish between tribes recognized before June 18, 1934 and those recognized thereafter. Rather, it suggests that whether or not a group of Indians is considered a tribe, and therefore may be eligible to have land taken into trust, turns on a tribe's federal recognition status at the time a trust acquisition is requested.

Moreover, the Secretary's proffered interpretation of "now" as meaning "today" is consistent with regulations implementing other provisions of the IRA.[9] For example, the regulation implementing 25 U.S.C. § 466, which directs the Secretary to regulate the operation and management of Indian forestry units, states that it applies to "any Indian tribe . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 163.1. Similarly, the regulation implementing 25 U.S.C. § 476, which allows eligible Indian tribes to organize and adopt constitutions and bylaws, defines eligibility in current terms: all Indian entities that have not

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[9] The Secretary's interpretation also is consistent with regulations interpreting and implementing other federal statutes establishing Indian programs and services. For example, the applicability of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, the applicability of minimum standards for basic education of Indian children in schools operated by the BIA, *id.* § 2001, and eligibility for Indian financial assistance and social services programs, *id.* § 13, all are defined in terms of current federal recognition. *See* 25 C.F.R. § 23.2; *id.* § 36.3; *id.* § 20.100.

voted to exclude themselves from the IRA and that are "included, or [are] eligible to be included, among those tribes . . . recognized and receiving services from the [BIA]" are eligible to organize under section 476. 25 C.F.R. § 81.1.

As to the Secretary's trust acquisition practice, it is not seriously disputed that the Secretary has never *rejected* an application to take land into trust for a federally recognized tribe on the ground that the tribe was not recognized and under federal jurisdiction in 1934. Responding to the State's allegations about whose trust acquisition applications h ve been *granted,* the Secretary and Indian amici have submitted to us lists of tribes that they assert were not federally recognized in 1934 for whom land has since been taken into trust. The State disputes this evidence, arguing that nearly all of the identified tribes either have no trust lands, are not "newly recognized" because they were under federal jurisdiction in 1934, or have obtained legislation from Congress specifically permitting trust acquisitions on their behalf.

The State's evidence of inconsistent practice is not persuasive. For example, although the State seems to concede that the Miccosukee Tribe was not recognized in 1934, it argues that the later trust acquisition for that tribe identified by Indian amici was made pursuant to specific statutory authorization, not section 465. But the statute to which the State points us, 25 U.S.C. §§ 1741-1750e, does not itself authorize acquisition of the parcel identified by Indian amici. Rather, it authorizes acquisition of a

different parcel. Indeed, in taking the parcel identified by Indian amici into trust, the Secretary explicitly relied on his authority under section 465.

Turning to a different distinction, the State argues that eight of the tribes identified by Indian amici were recognized and under federal jurisdiction in 1934 because they previously had signed treaties with the United States. It is not self-evident that simply because a tribe had signed a treaty with the U.S. government it necessarily was recognized and under federal jurisdiction in 1934; recognition as intended in section 479 requires an ongoing government-to-government relationship between a tribe and the United States. *See Cohen's Handbook of Federal Indian Law* § 3.02(3), at 138-40 (N.J. Newton et al., eds 2005).

Whether or not a treaty executed before 1934 has significance, however, the evidence is still that the Secretary has taken land into trust for tribes that did not *appear* to be federally recognized in 1934. We note two examples. The Secretary has taken land into trust for the Sault Ste. Marie Band of Chippewa Indians despite the Secretary's position that, regardless of prior treaties, the Band was not federally recognized in 1934. The Sault Ste. Marie Band is a successor to some of the Chippewa tribes that had signed treaties with the United States between 1785 and 1855. In addition, in 1855 the Band had signed two treaties with the United States. Despite those treaties, however, by 1917 the Department of the Interior did not recognize the Band as an entity with

which it had government-to-government relations. Opinion of Nat'l Indian Gaming Comm'n, The St. Ignace Parcel at 7 (July 31, 2006); *see also City of Sault Ste. Marie v. Andrus,* 532 F.Supp. 157, 161 (D.D.C.1980) (indicating that a period of non-recognition existed by stating that "although the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934"). The State rejoins that the Department of the Interior cannot abrogate an Indian treaty. But the validity of the Department's treatment of the Sault Ste. Marie Band's status under the treaties is not the issue before us. What is important is the Department's position that the Band was not recognized and under federal jurisdiction in 1934. *Id.* at 16. Nevertheless, after 1934, the Secretary has invoked his section 465 authority to take land into trust for the Band.

The Grand Traverse Band of Ottawa and Chippewa Indians provides a similar example. The Secretary has taken land into trust for the Grand Traverse Band, which the Department of the Interior ceased to recognize in 1872. The Grand Traverse Band signed the 1855 Treaty of Detroit with the United States. In 1872, however, the then-Secretary of the Interior severed the United States' relationship with the Band and ceased to treat the Band as a federally recognized tribe. *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.,* 369

F.3d 960, 961 (6th Cir.2004); *see also Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 198 F.Supp.2d 920, 924 (W.D.Mich.2002) ("Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe."). Yet, the Secretary has invoked his authority under section 465 to take twenty-one parcels of land into trust for the Band.[10]

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[10] Indian amici also submitted opinions of the Solicitor of the Department of the Interior discussing various tribes' eligibility to organize under the IRA as evidence that the Secretary has consistently interpreted "now" in section 479 to mean "today." The State's attempt to distinguish these opinions is unsuccessful. For example, in discussing the IRA eligibility of the St. Croix Indians of Wisconsin, the Solicitor makes no mention whatsoever of the tribe's status as of 1934. Solicitor's Opinion, Jan. 29, 1941, 1 *Op. Sol. on Indian Affairs* 1026 (1979). The State argues that it is clear from context that the tribe was not recognized as of 1934. Yet, although this is true, the Solicitor discusses the fact that the tribe has never had a separate tribal status, and that *until it does so,* only those Indians who meet the half-blood test are eligible to organize under the IRA. *Id.* at 1027. Moreover, contrary to the State's position, the Solicitor's opinion indicates that if the tribe takes certain steps, it may later become eligible to organize under the IRA as a recognized band. *Id.*

Similarly, in discussing the Nahma and Beaver Island Indians' eligibility to organize under the IRA, the Solicitor discusses the tribe's historical status, but then continues to discuss its then-current situation. Solicitor's Opinion, May 31, 1937, 1 *Op. Sol. on Indian Affairs* 747, 747-48 (1979). If the Solicitor had been concerned only with the tribe's status as of 1934, there would have been no reason for him to have considered the "recent . . . attitude of the Interior Department on the band status" of the Nahma and Beaver Indians, nor for him to state that it was "out of the question to establish any existing

(Continued on following page)

The State also concedes that the Secretary appears to have taken land into trust for two tribes, the Tunica-Biloxi Indian Tribe and the Narragansetts themselves, that were not under federal jurisdiction in 1934 and for whom Congress has passed no specific act authorizing trust acquisitions. Even if we had no reason to doubt the State's argument that the Secretary has not historically taken land into trust for tribes not recognized in 1934, however, in at least some cases the Secretary has not looked to the status of the tribe in 1934 or to the specific statutory authority identified by the State in making the determination to take land into trust. In *Baker v. Muskogee Area Dir.*, 19 I.B.I.A. 164 (1991), for example, the IBIA, in concluding that particular members of the Cherokee Nation of Oklahoma were eligible to have land taken into trust, did not rely on the 1936 Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-570, which authorized the Secretary to take land into trust for Indians in Oklahoma. Rather, the IBIA stated that the Indians "c[a]me within the IRA definition because they are members of a recognized Indian tribe under Federal jurisdiction." 19 I.B.I.A. at 179. The Secretary thus seems to have *intended* to exercise his section 465 authority to take land into trust on the basis of current federal recognition.

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band status" before concluding that the Indians were eligible for organization only under the IRA's half-blood provision. *Id.* at 748.

The State has not met its burden of showing inconsistent interpretation by the Secretary. Moreover, even if the State had shown that the Secretary has changed his interpretation of section 479 over time, that would not necessarily resolve the matter in the State's favor. The *Chevron* doctrine permits the Secretary some ability to alter his interpretation over time. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (under *Chevron*, an agency should have flexibility to vary its interpretation of a statute over time). The Secretary has given a reasoned explanation for his interpretation.

We reject the State's argument that the Secretary has been inconsistent in his interpretation of section 479 and is therefore not entitled to deference.

C. *The Settlement Act*

The State's next attack is to argue that the Settlement Act repealed the Secretary's trust authority as to all lands in Rhode Island. Alternatively, the State argues that the Settlement Act at least curtailed that authority so that any trust must preserve the State's civil and criminal jurisdiction over the Parcel.

There is simply nothing in the text of the Settlement Act, however, that accomplishes such a repeal or curtailment of the Secretary's trust authority. 25 U.S.C. § 1708(a) provides:

> Except as otherwise provided in this [Act], the *settlement lands* shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(emphasis added). The State would have us read the Act as if section 1708(a) applied to all lands the Tribe might ever acquire, either directly or as the beneficiary of a trust, but that is not what the section says. By its terms, section 1708(a) applies state law only to the 1800 acres of "settlement lands." The Parcel is not part of the settlement lands. No other provision of the Settlement Act directly provides for state jurisdiction outside of the settlement lands. No language in the Act applies state law to lands the Tribe might later acquire. More importantly, no language explicitly curtails, or even references, the Secretary's power under the IRA to take lands into trust and thereby to create Indian country.[11]

The State's argument thus depends on finding that the Settlement Act *implicitly* repealed the IRA,

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[11] Nor is this case controlled by our en banc decision in *Narragansett III*. That case concerned the State's jurisdiction over the settlement lands, *see* 449 F.3d at 20, and has no bearing on whether the Settlement Act abrogates the Secretary's trust authority outside of the settlement lands. Similarly, cases holding that section 1708(a) survived federal recognition and the conveyance of the settlement lands to federal trust are of no help to the State, since section 1708(a) refers only to the settlement lands. *See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341-42 (D.C.Cir.1998); *Narragansett I*, 19 F.3d at 694-95.

at least in part.[12] The framework for evaluating such a claim of implicit repeal was set out by the Supreme Court in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). First, we must look to affirmative manifestations of congressional intent to repeal the prior act, mindful of the "cardinal rule . . . that repeals by implication are not favored." *Id.* at 549 (omission in original) (quoting *Posadas v. Nat'l City Bank of N.Y.,* 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936)) (internal quotation marks omitted). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for [finding] a repeal by implication is [that] the earlier and later statutes are irreconcilable." *Id.* at 550. Such a conflict is not lightly to be found. "[A]bsent a clearly expressed congressional intention to the contrary," we must "give effect to both [acts] if possible." *Id.* at 551 (quoting *United States v. Borden Co.,* 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939)) (internal quotation marks omitted).

A determination of congressional intent must be rooted in the text of the Act. Nothing in the Act

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[12] The State adds nothing to its argument by also styling it as an issue of claim preclusion. Obviously, the earlier litigation that resulted in the Settlement Act could not have resolved the question raised in this case of whether the Settlement Act restricts the Secretary's trust authority under the IRA. By invoking "principles of res judicata," the State means nothing more than that the Tribe should be held to the settlement to which it previously agreed. What precisely the Tribe agreed to in the settlement is, of course, the question we are addressing.

explicitly curtails the Secretary's trust authority. The State offers two different lines of argument as to why provisions of the Act must be read to restrict that authority. One concerns how the Act affects the Tribe's rights; the other concerns how the Act affects the Secretary's authority. The provisions of the Settlement Act cited by the State, however, are most naturally read as merely resolving the claims that had clouded the titles of so much land in Rhode Island and that had led to the settlement embodied in the Act.

As to the provisions affecting the Tribe, the State relies independently on the extinguishment of aboriginal title in 25 U.S.C. §§ 1705(a)(2) and 1712(a)(2) and the further extinguishment in sections 1705(a)(3) and 1712(a)(3) of "all claims . . . based upon any interest in or right involving" certain land or natural resources. These provisions, however, follow sections 1705(a)(1) and 1712(a)(1), respectively, which validate "any transfer of land or natural resources" in the United States by the Narragansett Tribe or in Rhode Island by any Indian tribe "as of the date of said transfer."[13] The provisions then go on to state:

> (2) [T]o the extent that any transfer of land or natural resources described in subsection

[13] Section 1705 applies to the Narragansett Tribe and any land in Charlestown, Rhode Island. Section 1712 applies to land elsewhere in Rhode Island transferred by other Indian tribes. The relevant provisions in each are materially the same for our purposes here.

> (a) of this section may involve land or natural resources to which [an Indian tribe] had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and
>
> (3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims . . . by the [Narragansett Tribe], or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. § 1705(a). Given the references back to the transfers validated in paragraph (1), the evident purpose of these provisions is to extinguish claims based on the purported invalidity of those transfers.

The State's arguments that the provisions should be read more broadly are unavailing. First, the State argues that the extinguishment of aboriginal title over land in Rhode Island precludes the later exercise of tribal sovereignty over Rhode Island land acquired by the Secretary in unrestricted trust. The Secretary disputes whether aboriginal title is ever the basis for tribal sovereignty, but in any event, it is clear that

such title is not the only basis for tribal sovereignty. This is evident from the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). In *Sherrill,* the Supreme Court both held that "the Tribe [could not] unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue," *id.* at 202-03, and directed the Oneidas to 25 U.S.C. § 465 as "the proper avenue for [the tribe] to reestablish sovereign authority over [the relevant] territory," *id.* at 221. The State's protestation that *Sherrill* did not involve a statutory extinguishment of aboriginal title is beside the point. However aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty over land.

Trust acquisition is not incompatible with the extinguishment of aboriginal title. The Mashantucket Pequot Indian Claims Settlement Act, for example, contains virtually identical language extinguishing aboriginal title "to any land or natural resources the transfer of which was approved and ratified" by the Act. 25 U.S.C. § 1753(b). At the same time, the Act provides that certain land and natural resources "located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe," *id.* § 1754(b)(7), and that such lands are "declared to be Indian country," *id.* §§ 1752(7), 1755. It is implausible to think that Congress intended the extinguishment of aboriginal title in the Rhode Island Settlement Act to preclude the taking of land into

unrestricted trust, but did not intend for identical language in the Mashantucket Settlement Act to do so.[14]

Alternatively, the State argues that the "all claims" language in paragraph (3) even more broadly forecloses the assertion of tribal sovereignty over non-settlement lands. To hold otherwise, says the State, would render that language surplusage. Paragraphs (2) and (3) are complementary, however, not duplicative. While paragraph (2) extinguishes a form of title, paragraph (3) extinguishes claims. Moreover, paragraph (3) covers claims based on other forms of title, besides aboriginal title, that the Tribe might have held to land in Rhode Island prior to the Settlement Act.

The State's broad interpretation of paragraph (3) proves too much. The State argues that the paragraph precludes an assertion of tribal sovereignty over any land in Rhode Island. Nothing in the language of the provision, which refers to "any interest in or right involving" such land, distinguishes between claims of sovereignty and traditional property claims. Indeed, the latter are explicitly included. *See id.* § 1705(a)(3) ("including but not limited to claims for trespass damages or claims for use and

[14] We attach little significance to the fact that the Mashantucket Settlement Act explicitly authorizes trust acquisition, while the Rhode Island Settlement Act does not. The former, unlike the latter, granted federal recognition to the tribe. *See* 25 U.S.C. § 1758(a).

occupancy"). It would be highly improbable that Congress intended to prevent the Tribe from asserting any ownership interest over land it purchased outside the settlement lands, and it would be contradictory as to the settlement lands themselves. Thus, there is no support for reading this provision as precluding all future assertions of tribal sovereignty over land in Rhode Island.

Ultimately, this entire line of argument by the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do. The displacement of state law arises from the Secretary's authority and not from the Tribe's mere purchase of the land. *See Cass County, Minn. v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 113-15, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998). In order to prevail on its claim of implied repeal, the State must show that the Settlement Act repeals the Secretary's authority under the IRA.

As to the implied repeal of the Secretary's power, the State first argues that the Secretary is bound by the extinguishment of the Tribe's claims because that extinguishment binds the Tribe's "successor in interest." 25 U.S.C. § 1705(a)(2), (3). Even if the Secretary is such a "successor in interest," however, those provisions cannot plausibly be read to repeal the Secretary's power under the IRA to take land into trust. The Secretary's power does not turn on the Tribe's original aboriginal interest in the Parcel, before it purchased the land, nor does it turn on

whether the Secretary is a successor in interest to the Tribe.[15]

The State also relies on 25 U.S.C. § 1707(c), which provides:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands. . . .

The language of this provision, however, cannot be read to have a preclusive effect or to limit the Secretary's powers in any way. The statement that the United States has "no further duties or liabilities under this subchapter" merely delimits the federal government's obligations in implementing the Settlement Act.

We reject the State's suggestion that this language parallels the language in the Mashantucket

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[15] We do not accept the State's comparison of the Rhode Island Settlement Act to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629h, and the resulting suggestion that trust acquisition would be as inappropriate in Rhode Island as it purportedly would be in Alaska. ANCSA eliminated previously existing Indian country in Alaska. *See Native Vill. of Venetie*, 522 U.S. at 532-34. Even if one might infer from that elimination an intent to preclude later trust acquisitions, no such intent can be inferred from the Rhode Island Settlement Act's failure to affirmatively establish Indian country for an as-yet unrecognized tribe.

Settlement Act that the Second Circuit found to prohibit certain trust acquisitions. *See Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior,* 228 F.3d 82, 88 (2d Cir.2000). The Mashantucket Settlement Act uses very different language that provides that "the United States shall have no further trust responsibility with respect to [certain] land and natural resources" outside of the settlement lands. 25 U.S.C. § 1754(b)(8). Disclaiming "trust responsibility" over land is nothing like disclaiming "duties or liabilities under this subchapter."

There is nothing in the text of the Settlement Act that clearly indicates an intent to repeal the Secretary's trust acquisition powers under the IRA, or that is fundamentally inconsistent with those powers.[16] This lack of language is not because either Congress or the parties failed to anticipate that the Tribe might later become federally recognized and eligible for the benefits of the IRA. The Settlement Act specifically provides for a restraint on alienation of the settlement lands "if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians." *Id.* § 1707(c). The underlying JMOU also explicitly recognized that the Tribe would "not receive Federal recognition" in the implementation of the settlement, but would "have the same right to petition for such recognition . . . as other groups." JMOU para. 15.

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[16] The State has not cited any legislative history that might lead us to interpret the text differently.

Had the Act intended to limit the Secretary's trust authority in case of federal recognition, it could have done so explicitly. It would have been easy to extend the provisions of section 1708(a) preserving state sovereignty to cover all lands in Rhode Island owned by or held in trust for the Tribe. No such language appears in the Act. Similarly, as the IBIA also noted, paragraph 15 of the JMOU would have been "a logical place for the parties to set out any restrictions" on the Secretary's trust authority following federal recognition of the Tribe. *Town of Charlestown,* 35 I.B.I.A. at 101. No such restrictions appear. Nor does the Settlement Act contemplate any role for the State to play in the Secretary's decision whether to take the land into trust. This is in contrast to the Indian Gaming Regulatory Act.

In other settlement acts, Congress has specifically described limits on the Secretary's trust authority. In the Maine Indian Claims Settlement Act, Congress expressly precluded application of section 465. 25 U.S.C. § 1724(e) ("Except for the provisions of this [Act], the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine."). In the Mashantucket Settlement Act, Congress precluded the trust acquisition of non-settlement lands purchased with settlement funds. *See Blumenthal,* 228 F.3d at 88. The absence of any restrictions in the

Settlement Act supports our finding that no restrictions were intended.[17] *See id.* at 90.

The State's fallback position is that the Settlement Act requires that this court order the Secretary to honor the intent of the bargain it believes is embodied in the Act by putting the Parcel into a restricted trust, subject to state laws and jurisdiction.[18] Acknowledging the genuineness of the State's sense that its bargain has been upset, we find that the relief it seeks is not an appropriate exercise of judicial power.

In the Settlement Act, the State procured at least two clear benefits: (1) the settling of disputed land claims and (2) the application of its civil and criminal laws and jurisdiction to the settlement lands. Beyond that, the State argues that it would never have agreed to displacement of state law as to later

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[17] There are also other examples of Congress's imposing explicit conditions on the taking of land into trust, for example, by limiting the number of acres of land and the number of acre feet of water rights. *See Nevada v. United States,* 221 F.Supp.2d 1241, 1244 (D.Nev.2002) (discussing section 103(A) of the Fallon Paiute Shoshone Indian Tribe Water Rights Settlement Act of 1990, Pub.L. No. 101-618, 104 Stat. 3289, 3291).

[18] The Secretary takes the position that he has no authority to impose restrictions on land taken into trust under the IRA, absent a statutory directive imposing such restrictions. We do not reach this issue. To the extent that the State argues that the Settlement Act itself is such a statutory directive requiring a restricted trust, we reject that argument for the same reasons that we found that the Settlement Act does not eliminate trust authority altogether.

acquired parcels if the issue had surfaced during the negotiations. The State argues that the practical consequences of the unrestricted trust leave it in an entirely unsatisfactory position and undermine the central bargain. Rhode Island points out that it is a small, very populous state and that the practical consequences of establishing Indian country for its nearby towns may be far greater than they would be in less densely populated areas.

Even so, we are still bound by the language of the Settlement Act. Even viewing the State's argument in contract terms, it is rare that a court will step in and reform a contract. *See Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 275 (1st Cir.2006) (reversing the district court's reformation of a contract). Our ability to edit, as opposed to interpret, an act of Congress is no less constrained: only a finding of absurdity, not present here, provides the necessary precondition. *Compare Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989) (editing a federal rule of evidence where the apparent distinction between civil plaintiffs and civil defendants would be "unfathomable"), *with W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100-01, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (refusing to read in an additional component to a fee-shifting provision on the basis that Congress "simply forgot" to include it). *See also Blumenthal*, 228 F.3d at 91 ("While we might question the wisdom of different jurisdictional provisions governing different trust lands, we will not provide a strained interpretation of

the Settlement Act simply to avoid such a result."). The judiciary may not usurp the role of Congress.

D. *Constitutional Claims*

In support of recognition of its state sovereignty interests under the Constitution, the State presents four arguments. It argues first that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, does not provide the Secretary the authority to displace state law within a state's boundaries, and that section 465 of the IRA therefore violates the Tenth Amendment. Next, it argues that the Secretary may not, in any event, displace state law without the State's consent, by operation of the Enclave Clause of the Constitution. *Id.* art. I, § 8, cl. 17. The State further argues that the Secretary's action is barred by the Admissions Clause, *id.* art. IV, § 3, cl. 1, which prohibits formation of new states within the jurisdiction of any other state. Finally, the State argues that section 465 is an unconstitutional delegation of legislative authority. We reject all of these arguments.

1. *The Indian Commerce Clause and the Tenth Amendment*

The authority to regulate Indian affairs is within the enumerated powers of the federal government. *Id.* art. I, § 8, cl. 3; *Cotton Petroleum Corp.*, 490 U.S. at 192 ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *Morton*, 417

U.S. at 551, 94 S.Ct. 2474 (noting that Congress has plenary power "to deal with the special problems of Indians," including the power to legislate on their behalf). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *see also United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194, 23 L.Ed. 846 (1876) ("Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes. . . . ").

The Tenth Amendment to the U.S. Constitution reserves to the states those powers not expressly delegated to the federal government. The powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Because Congress has plenary authority to regulate Indian affairs, section 465 of the IRA does not offend the Tenth Amendment. *Cf. Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir.2000) ("Because Congress possesses plenary authority over immigration-related matters, it may freely displace or preempt state laws in respect to such matters.").

2. *The Enclave Clause*

The Enclave Clause of the Constitution provides that Congress may "exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." U.S. Const. art. I, § 8, cl. 17. The Enclave Clause's provision for exclusive federal jurisdiction was intended to ensure that "places on which the security of the entire Union may depend" are not "in any degree dependent on a particular member of it." *Fort Leavenworth R.R. Co. v. Lowe,* 114 U.S. 525, 530, 5 S.Ct. 995, 29 L.Ed. 264 (1885) (quoting *The Federalist* No. 43 (James Madison)) (internal quotation marks omitted). The State argues that "[p]rimary federal jurisdiction through federal superintendence over the land . . . coupled with Congress's exclusive legislative authority over Indian matters . . . collectively operate to exclude state law [on trust lands]." As a result, it argues, trust acquisitions create federal enclaves and therefore require state consent.

We disagree. First, trust land does not fall within the plain language of the Enclave Clause. It is not purchased "for the erection of forts, magazines, arsenals, dockyards, [or] other needful buildings." Rather, it is held in trust for the benefit of Indians.

Second, in *Surplus Trading Co. v. Cook,* 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930), the Supreme Court offered an Indian reservation as a "typical

illustration" of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon. *Id.* at 651. The Supreme Court recently confirmed the reasoning underlying the observation that Indian lands are not federal enclaves:

> Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries."

Hicks, 533 U.S. at 361 (alteration in original) (quoting *White Mountain Apache Tribe,* 448 U.S. at 141, 100 S.Ct. 2578 (quoting *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561, 8 L.Ed. 483 (1832))). As a result, the Secretary's trust acquisition of lands for the Narragansetts does not even implicate the Enclave Clause.

3. *The Admissions Clause*

The Admissions Clause of the Constitution provides that "no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1. The State argues

that the creation of Indian country within Rhode Island amounts to the formation of a new state within Rhode Island's jurisdiction.

This argument is without merit. The Admissions Clause prohibits Congress only from unilaterally establishing within an existing state a body "on an equal footing with the original states in all respects whatsoever." *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911) (internal quotation marks omitted). For purposes of the Admissions Clause, a state is a body "equal in power, dignity and authority" to existing states. *Id.* The Secretary's trust acquisition for the Narragansetts does not establish such a body. As a result, the acquisition does not violate the Admissions Clause.

4. *The Nondelegation Doctrine*

The Constitution vests "[a]ll legislative Powers [t]herein granted . . . in a Congress of the United States." U.S. Const. art. I, § 1. Congress "is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Yet, the Supreme Court has recognized that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States,* 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

As a result, the Supreme Court has repeatedly held that Congress may confer decisionmaking authority on agencies as long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (second alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (internal quotation marks omitted). The Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta,* 488 U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 91 L.Ed. 103 (1946)).

The State and its amici argue that section 465 lacks the requisite "intelligible principle" and therefore is an unconstitutional delegation of legislative authority.

25 U.S.C. § 465 provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands, . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands, . . . and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of

> such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico . . . becomes law.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

In support of its argument, the State relies primarily on an Eighth Circuit decision, *South Dakota v. U.S. Dep't of the Interior,* 69 F.3d 878 (8th Cir.1995), *vacated,* 519 U.S. 919, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996), that held that section 465 was an impermissible delegation that was completely lacking in "boundaries" and "intelligible principles" and that "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* at 882. The circuit opinion in *South Dakota* was vacated by the Supreme Court, which did not publish an opinion explaining its decision, 519 U.S. at 919-20, and as a result has not set any precedent. *Lovelace v. Se. Mass. Univ.,* 793 F.2d 419, 422 (1st Cir.1986) (per curiam).

On remand, the Eighth Circuit held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust."[19] *South Dakota v. U.S. Dep't of Interior,* 423 F.3d 790, 797 (8th Cir.2005). The court noted that the statute allows the Secretary to acquire trust lands only for Indians as defined in 25 U.S.C. § 479, and that the statute prohibits the Secretary from taking extra-reservation lands into trust for Navajo Indians. *See* 423 F.3d at 797. The *South Dakota* court also referred to the legislative history of the IRA,[20] which explains that the goals motivating trust acquisitions are "rehabilitati[on] [of] the Indian's economic life" and "develop[ment] [of] the initiative destroyed by . . . oppression and paternalism." *Id.* at 798 (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 73-1804, at 6-7 (1934))) (internal quotation marks omitted). As the dissent from the original *South Dakota* decision had

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[19] In so holding, the Eighth Circuit agreed with the Tenth Circuit's decision in *United States v. Roberts,* 185 F.3d 1125 (10th Cir.1999), which held that section 465 contains standards sufficient to guide the Secretary's exercise of discretion. *Id.* at 1137.

[20] Amici states argue that legislative history should not factor into the intelligible principle analysis. We note simply that the Supreme Court in *Mistretta* referred to legislative history in explaining that the Sentencing Reform Act of 1984 was not an unconstitutional delegation of legislative authority. *See* 488 U.S. at 375 n. 9, 376 n. 10.

noted, the historical context of the IRA is important; section 465's "direction that land be acquired 'for the purpose of providing land for Indians[]' has specific meaning in light of the failure of the allotment policy and [c]ongressional rejection of assimilation as a goal." 69 F.3d at 887 (Murphy, J., dissenting).

Other provisions of the IRA reinforce such an interpretation. *See* 25 U.S.C. § 461 (prohibiting allotment of reservation lands to individual Indians); *id.* § 462 (extending indefinitely existing trust periods and restrictions on alienation of Indian lands); *id.* § 463(a) (authorizing restoration of surplus lands to tribal ownership); *id.* § 464 (prohibiting the transfer of restricted Indian lands except to Indian tribes). We find the reasoning of the Eighth Circuit's second *South Dakota* opinion persuasive.

The Ninth Circuit's decision in *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir.1997), also supports the Secretary's position that section 465 is not an unconstitutional delegation of legislative authority. Although not addressing a nondelegation challenge to section 465, the *Confederated Tribes* court stated that "[t]he general delegation of power to the Executive to take land into trust for the Indians is a valid delegation because Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used." *Id.* at 698.

The Supreme Court has upheld the constitutionality of statutes authorizing regulation in the "public interest," *see, e.g., Nat'l Broad. Co. v. United States,* 319 U.S. 190, 225-26, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); *N.Y. Cent. Sec. Corp. v. United States,* 287 U.S. 12, 24-25, 53 S.Ct. 45, 77 L.Ed. 138 (1932), as well as statutes authorizing regulation to ensure fairness and equity, *see Am. Power & Light Co.,* 329 U.S. at 104-05; *Yakus v. United States,* 321 U.S. 414, 420, 426-27, 64 S.Ct. 660, 88 L.Ed. 834 (1944). As the Court stated in its most recent nondelegation decision, it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Am. Trucking Ass'ns,* 531 U.S. at 474-75 (quoting *Mistretta,* 488 U.S. at 416, 109 S.Ct. 647 (Scalia, J., dissenting)) (internal quotation marks omitted). We similarly decline to do so here. We hold that section 465 is not an unconstitutional delegation of legislative authority.

E. *APA-Related Claims*

The focus of the en banc proceedings was on the three sets of arguments discussed above. The State presented another set of claims, rejected by the panel, that the Secretary's decision to take the Parcel into trust for the Tribe violates the APA. The State did not seek en banc review of this issue. In granting en banc review, we withdrew our panel opinion, which had been reported at 423 F.3d 45. In the interests of

completeness, we now also reject the State's APA claims.

We set forth here a shortened and slightly modified version of the panel's opinion as to this issue.

The State claims that the Secretary's action was an abuse of discretion under the APA. Our review of the Secretary's decision is governed by section 706(2)(A) of the APA, which provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's determination is arbitrary and capricious if the agency lacks a rational basis for making the determination or if the decision was not based on consideration of the relevant factors. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997). The Court's review under section 706(2)(A) is highly deferential, and the Secretary's action is presumed to be valid. *See Conservation Law Found. of New Eng., Inc. v. Sec'y of Interior*, 864 F.2d 954, 957-58 (1st Cir.1989). A reviewing court cannot substitute its own judgment for that of the agency. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Associated Fisheries*, 127 F.3d at 109. No deference is given to the district court's decision. *Associated Fisheries*, 127 F.3d at 109.

The State makes five arguments as to why the Secretary's decision was unlawful under section 706(2)(A): (1) the BIA relied on the Tribe's findings, rather than conducting an independent evaluation of the Tribe's application; (2) the BIA misapplied the factors enumerated in 25 C.F.R. § 151.10 for evaluating a fee-to-trust transfer; (3) the Native American Housing Assistance and Self-Determination Act cooperation agreement waiver violated due process; (4) the BIA failed to consider the environmental impact of the housing project planned for the Parcel and the project's compliance with the Coastal Zone Management Act; and (5) the BIA failed to consider noncompliance with the Indian Gaming Regulatory Act. We disagree, and we find that the Secretary's decision to accept the Parcel into trust did not violate the APA.

1. *Independent Evaluation of the Tribe's Trust Application*

The State claims that the BIA's decision to take the Parcel into trust was arbitrary and capricious because it relied exclusively on the Tribe's assertions and failed to consider other important facts that occurred between 1993 and 1997. The State points to substantial passages in the Secretary's decision that contain verbatim restatements of information provided by the Narragansett Tribe in support of their 1993 trust application as evidence that the BIA failed to conduct an independent evaluation of the Tribe's 1997 application.

There is ample evidence in the administrative record that the BIA conducted its own, independent evaluation of the Tribe's application and that it considered the events following the Tribe's 1993 application. For example, between 1993 and 1997, the BIA required the Tribe to supplement its initial Environmental Assessment; conducted an environmental hazard survey of the Parcel; required confirmation of consistency with the State's Coastal Resources Management Plan; was apprised of, and offered to facilitate, negotiations between the Tribe, the Town, and the State concerning both environmental and jurisdictional issues attendant to the Tribe's development of the Parcel; and specifically requested that the Regional Solicitor address several legal and jurisdictional issues raised by the State in its comments to the BIA on the Tribe's trust application. This demonstrates that the BIA's determination was the result of its own, independent evaluation of the 1997 application.

2. *Application of the 25 C.F.R. § 151.10 Factors*

The State claims that the BIA failed to apply the proper criteria when it evaluated the Tribe's application for trust acquisition. The regulations governing the BIA's evaluation of applications to have land taken in trust are laid out at 25 C.F.R. part 151. The factors to be considered for an on-reservation acquisition are found in section 151.10, and the factors for

an off-reservation acquisition are found in section 151.11.[21] In making the decision to accept the Parcel into trust, the BIA considered the on-reservation factors in section 151.10.[22] The State claims that the

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[21] For the purpose of 25 C.F.R. part 151, land is considered to be on-reservation if it is "located within or contiguous to an Indian reservation," 25 C.F.R. § 151.10, and off-reservation where "the land is located outside of and noncontiguous to the tribe's reservation," *id.* § 151.11. The State challenges the finding by the BIA and the district court that the Parcel is adjacent to the settlement lands, yet recognizes that this determination is insignificant to the application of either section in this case, as the sections differ only slightly. *Compare id.* § 151.10, *with id.* § 151.11. The Parcel is adjacent to the Settlement Lands, but separated from them by a town road. *Narragansett II,* 89 F.3d at 911.

[22] Those factors include:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> . . .
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> . . . .

25 C.F.R. § 151.10.

BIA failed to consider "the need of . . . the tribe for additional land," 25 C.F.R. § 151.10(b). The State also questions whether the BIA sufficiently scrutinized "the tribe's justification of anticipated benefits from the acquisition" as required by section 151.11(b).[23]

A reviewing court will determine only "whether the [BIA's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens To Preserve Overton Park,* 401 U.S. at 416. The fact that the BIA found the Parcel, which is across a town road from the settlement lands, to be "contiguous" to the settlement lands that are currently in trust, and thus determined that it should consider the "on-reservation" factors enumerated in 25 C.F.R. § 151.10, is certainly not clear error and is within the Secretary's discretion. The record shows that the BIA complied with section 151.10, including evaluating the Tribe's need for the additional land, and the State has not shown that the Secretary made a clear error of judgment.

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[23] The criteria to be considered pursuant to section 151.11(b) are as follows:

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. . . .

25 C.F.R. § 151.11(b).

It was not necessary for the BIA to consider the factors under section 151.11, since it found section 151.10 to be applicable to this trust determination. While the Secretary need not have considered section 151.11(b), the close proximity between the Tribe's settlement lands and the Parcel would not have required the Secretary to give the greatest scrutiny to the "tribe's justification of anticipated benefits from the acquisition." 25 C.F.R. § 151.11(b).

3. *The Native American Housing Assistance and Self-Determination Act Cooperation Agreement Requirement*

At the time of the BIA's decision to acquire the Parcel into trust, HUD was precluded from releasing funds pursuant to the Native American Housing Assistance and Self-Determination Act for any tribe's housing development unless an agreement for local cooperation on issues such as taxes and jurisdiction had been entered into by the tribe and the local government where the housing was located. 25 U.S.C. § 4111(c). In the instant case, the Narragansett Tribe did not obtain such an agreement with the Town. However, section 4111(c) has since been amended to permit HUD to waive the cooperation agreement requirement, 25 U.S.C. § 4111(c), *as amended by* Pub.L. No. 106-569, § 503(a)(2), 114 Stat. 2944, 2962 (2000), and the Tribe claims to have obtained such a waiver.

The State argues that this waiver is invalid because the State apparently did not receive notice of the Tribe's application for a waiver until after the waiver had been granted. On appeal, the State contends that if the BIA accepted the waiver, the BIA has inherited the legal error and acted in an arbitrary and capricious manner. As the district court noted, "25 U.S.C. § 4111(c) establishes a prerequisite to HUD's award of housing grants. It does not pertain to the BIA's trust acquisition authority." *Carcieri,* 290 F.Supp.2d at 178. Nothing in the § 151.10 factors requires the BIA to ensure that a local cooperation agreement is in place for an Indian Housing project.

4. *Environmental Considerations*

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f), and its supporting regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. parts 1500-1518, direct federal agencies to consider the environmental impact of agency decisions. The State argues that the Secretary and the BIA (1) failed to consider the environmental impact in reaching the decision to accept the Parcel into trust because no Environmental Impact Statement (EIS) was prepared, and (2) failed to conduct their own evaluation of the environmental impact and instead improperly relied on an Environmental Assessment (EA) submitted by the Narragansett Tribe. We disagree.

Federal agencies are required to prepare an EIS for any action that could significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. NEPA provides that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). However, in the absence of a finding that the proposed action would significantly affect the quality of the human environment, the BIA was not required to prepare an EIS. *See, e.g., Londonderry Neighborhood Coal. v. Fed. Energy Regulatory Comm'n,* 273 F.3d 416, 419 (1st Cir.2001) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 49 (D.C.Cir.1999)).

The CEQ has issued guidance on whether to prepare an EIS. This guidance provides that "if the agency determines on the basis of the environmental assessment not to prepare a statement," then the agency should "[p]repare a finding of no significant impact" pursuant to section 1508.13. 40 C.F.R. § 1501.4(e). The applicant may prepare the EA provided that the agency "make[s] its own evaluation of the environmental issues and take[s] responsibility for the scope and content of the environmental assessment." *Id.* § 1506.5(b). In this case, the BIA followed its standard operating procedure for externally initiated proposals by obtaining an EA from the

Tribe and considering it along with supplemental information the BIA requested from the Tribe and information gathered independently by the BIA. *See NEPA Handbook* para. 4.2.B. After reviewing the EA and the requisite supplemental information, the BIA completed its environmental analysis and issued a finding of no significant impact. The BIA's issuance of a finding of no significant impact satisfied its responsibilities under NEPA. *See* 40 C.F.R. § 1501.4(e).

Separately, the State contends that the BIA should have obtained a federal consistency review in accordance with the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466, before making its trust determination. The CZMA requires state consultation on federally permitted coastal development activities.[24] The State asserts that the BIA's failure to

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[24] Specifically, 16 U.S.C. § 1456(c) provides, in relevant part:

> (1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).
>
> . . . .
>
> (C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency. . . .
>
> (2) Any Federal agency which shall undertake any development project in the coastal zone of a state

(Continued on following page)

take direct action to ensure that the housing project was consistent with the Rhode Island Coastal Zone Management Program (RICZMP) before making its trust determination was a violation of the CZMA. We disagree.

The State has failed to demonstrate that a consistency review of the Tribe's housing development was necessary at the trust acquisition stage. The development of the Parcel is a project that was commenced by the Tribe, in conjunction with HUD, prior to the Tribe's application for trust acquisition. The Rhode Island Coastal Resources Management Council correctly recognized that the development of the Parcel, which required its own federal consistency determination, was a separate matter from the trust acquisition, and properly found that the Tribe's application for trust status was consistent with the RICZMP.

5. *The Indian Gaming Regulatory Act*

Finally, the State contends that the true purpose of the Tribe's application for trust acquisition is the development of gambling facilities on the Parcel – rather than development of tribal housing as the BIA found in its evaluation pursuant to 25 C.F.R. § 151.10(c) – and that the BIA's failure to consider the

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shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved State management programs.

Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, in its decision was an abuse of discretion. We reject the State's argument that the Secretary's decision to acquire the Parcel in trust should be reversed and that further inquiry into whether the Parcel would be used for gaming purposes is now required.

No evidence that the Tribe intends to use the Parcel for anything other than tribal housing, as determined by the BIA, was presented. "In fact, after the plaintiffs expressed concern over the potential for development of a gaming facility on the parcel, the tribe reaffirmed that it intended to use the parcel for a housing development and stated that it had 'no immediate plans for any further future development.' " *Carcieri*, 290 F.Supp.2d at 178 (quoting II Admin. Rec., tab N).

As support for its position, the State points to an IBIA decision that reversed a trust acquisition decision due to the BIA's failure to consider the impact of a potential casino, even though the applicants denied any intention of using the property for a casino. *See Vill. of Ruidoso, N.M. v. Albuquerque Area Dir., Bureau of Indian Affairs*, 32 I.B.I.A. 130 (1998). However, in *Village of Ruidoso*, the IBIA determined that, despite the tribe's denial that the application for trust acquisition was for gaming purposes, it was clear from the planned gaming-related uses of the property and the fact that the property had been given to the tribe by a company that the BIA "apparently understood to have some gaming connection

with the Tribe" that the application might well have been for gaming purposes. *Id.* at 136. In that situation, the BIA should have further analyzed the possibility of gaming. *Id.* at 140.

We agree with the district court that

> although the possibility that the parcel might be used for gaming activities was raised before the BIA, the bureau's determination that the parcel would be used to provide housing was amply supported by the record. In view of the deferential standard of review afforded to agency decisions under the APA, the bureau's determination in this regard must be sustained.

Carcieri, 290 F.Supp.2d at 178.

III.

The decision of the district court is *affirmed.* Costs are awarded to the Secretary.

HOWARD, Circuit Judge, dissenting.

Respectfully, I disagree with the majority's analysis of the Settlement Act. In my view, the majority opinion disregards Congress's (and the parties') purpose in passing the Settlement Act and is inconsistent with our own recent interpretation of the Settlement Act. *See Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (1st Cir.2006) (en banc). At

bottom, under the Settlement Act, the Secretary may only take the Parcel into a restricted trust[25] that provides for Rhode Island's continued criminal and civil jurisdiction over the Parcel. The State makes this argument in two forms. First, by arguing that the Settlement Act effectuates a partial implied repeal of the IRA as to state jurisdiction on land taken into trust by the BIA. Second, by arguing that the statutes can be harmonized by reading the IRA narrowly and subject to the Settlement Act's provisions. Either approach gets to the same conclusion. Significantly, the generous rules of "Indian construction" do not apply in analyzing an implied repeal. *See Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 790 (1st Cir.1996) (the normal principles of implied repeal are applied in the Indian law context).

The parties and amici do an excellent job in acquainting the court with the many complexities of both the case and the issues inherent in "Indian law." However, the ultimate resolution of the case comes down to a very narrow question: In the specific context of the Tribe and State, what did Congress intend the Settlement Act to do?

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[25] I do not challenge the majority's conclusion that the BIA may take the Parcel into trust, as the State previously permitted the Narragansetts to take the Settlement Lands into trust in 1988. But any new trust lands must also be explicitly made subject to the State's criminal and civil laws.

The key provision is Section 1705, which is written far more broadly than the majority concludes.[26] In its first two provisions that section retroactively ratifies all the Tribe's prior land transfers anywhere in the United States and extinguishes the Tribe's aboriginal title in all such lands. *See* 25 U.S.C. § 1705(a)(1) & (2). More significantly, Section 1705 goes on to extinguish future land claims:

> (3) by virtue of the approval of a transfer of land or natural resources effected by this section or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member of stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

Id. § 1705(a)(3). This provision obviously goes well beyond merely extinguishing aboriginal title (and

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[26] Indeed, the very breadth of the language indicates more was contemplated by the parties than merely resolving an immediate dispute over title.

claims based thereon), which was accomplished in the prior subsection. *See id.* § 1705(a)(2). This language forecloses any future "Indian" land claim of any type by the Tribe regarding land in Rhode Island (or anywhere in the United States, for that matter). Thus, Congress (and the parties) intended to resolve all the Tribe's land claims in the state once and for all.

The majority argues that Section 1705(a)(3) cannot be read so broadly; otherwise, the Tribe would be barred from asserting any land claims. *See ante,* at 42-43. But the majority disregards a significant factor-the nature of the land claims that were barred. The legislative history of the Settlement Act specifically states that the "extinguishment of Indian land claims is limited to those claims raised by **Indians qua Indians**." H.R. Rep. 95-1453, at 1955 (1978) (emphasis added). As we recently stated, through the Settlement Act "the Tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished." *Narragansett Tribe,* 449 F.3d at 22. Thus, the Tribe would be free to assert any claim that any other landowner in Rhode Island could make under state law, but would be foreclosed from making claims based entirely on the Tribe's status as an Indian tribe. It is beyond peradventure that asking to have land taken into trust by the BIA under the IRA to

effect an ouster of state jurisdiction is a quintessential "Indian" land claim.[27]

Moreover, "Congress does not legislate in a vacuum," and among the matters that a court must consider in assessing a statute are general policies and pre-existing statutory provisions. *Passamaquoddy Tribe*, 75 F.3d at 789. The Settlement Act was enacted over 40 years after Section 465 of the IRA and, given the explicit acknowledgment of possible future recognition for the Tribe,[28] Congress was well aware of the IRA when enacting the Settlement Act. It is neither logical nor necessary to find that Congress enacted legislation effectuating this carefully calibrated compromise between three sovereigns, which required significant expenditures by both the federal government and the State, which provided a significant amount of land to the Tribe, and which provided for a delicate balancing of the parties' interests, only to permit the legislation to be completely subverted by subsequent agency action.

On this score, the majority misses the exquisite irony that the Parcel was part of the lands originally

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[27] The Tribe would still have the option of obtaining the State's consent to make certain Indian land claims-such as the 1988 placement of the settlement lands in trust (subject to Rhode Island law) with the BIA.

[28] The Tribe's recognition by the BIA changed little, as this court has held that the jurisdictional grant to the State in the Settlement Act survived such recognition. *See Narragansett Indian Tribe*, 19 F.3d at 694-95.

claimed by the Tribe. It would be antithetical to Congress' intent to allow the Tribe to purchase a portion of the originally disputed lands that were the subject of the earlier lawsuits that ultimately led to the JMOU and Settlement Act, place it in trust with the BIA, and thereby create "Indian country" in direct contravention of the Settlement Act's prohibitions. For this same reason, the majority's attempt to distinguish our recent *Narragansett Tribe* opinion as pertaining only to the "Settlement Lands" is unpersuasive. *See ante,* at 37 n. 11. By that reasoning, the Tribe could swap the Settlement Lands for adjacent land and undo any limitations contained in the Settlement Act. The Settlement Act cannot be reasonably construed to allow such absurd results.

Further, the Settlement Act was novel; it was the first statute resolving Indian land claims, premised upon the Nonintercourse Act, growing out of an out-of-court settlement negotiated by a tribe and the state/landowners. *See* H.R. 95-1453, at 1951 (1978). Indeed, it was expected to serve as a template for the resolution of other Eastern tribes' land claims under the Nonintercourse Act. *See id.; see also Oneida Indian Nation,* 125 S.Ct. at 1483-85 (discussing Nonintercourse Act and original 13 states' "preemptive right to purchase from the Indians"). In light of the fact that the Settlement Act was the first statute of its kind, the majority's observation that subsequent statutes were more explicit in limiting certain aspects of the Secretary's power proves nothing. Elaborate statements regarding the Tribe's

relationship with the BIA would have been unwarranted in the Settlement Act, given that the Tribe had not yet been recognized.

Moreover, that subsequent acts dealing with Eastern tribes made specific provision for the Secretary's ability to take land in trust for a tribe, *see, e.g.*, 25 U.S.C. § 1771d(c) & (d) (Massachusetts Indian Claims Settlement); *id.* § 1724(d) (Maine Indian Claims Settlement); *id.* § 1754(b) (Connecticut Indian Claims Settlement), supports the conclusion that Congress anticipated no such result under the Settlement Act. Given that the State had full criminal and civil jurisdiction over its territory, that any potential jurisdictional issue concerning the Settlement Lands was specifically addressed, and that all future Indian land claims were barred, there would be no future land scenarios that Congress would need to address more specifically (as it did in the other acts).[29] As we have noted, "the Settlement Act, properly read, ensures that the State may demand the Tribe's compliance with state laws of general application." *Narragansett Tribe,* 449 F.3d at 26.

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[29] In extinguishing the Tribe's aboriginal title in the Settlement Act, Congress was inspired by the Alaska Native Claims Settlement Act ("ANCSA"). *See* H.R. Rep. 95-1453, at 1951. As noted by the Supreme Court, the ANCSA sought to accomplish this goal "without creating a reservation system or lengthy wardship of trusteeship." *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520, 524 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) (internal citation and quotation omitted).

There is also nothing novel about requiring the BIA to accept the Parcel into trust with restrictions. The BIA is authorized to take restricted interests in land into trust, *see* 25 U.S.C. § 465, and, in dealing with other tribes, Congress has specifically directed the BIA to take land into trust subject to a settlement act's provisions, *see, e.g., id.* § 1771d(d); *id.* § 1773b.

It is also worth noting that Congress acted promptly to preserve the State's jurisdiction over the Tribe's lands the last time this court challenged it. When this court held that the Tribe exercised sufficient jurisdiction and governmental authority over the Settlement Lands to invoke the Indian Regulatory Gaming Act, *see Narragansett Tribe,* 19 F.3d at 703, Congress promptly amended the Settlement Act to provide explicitly that the Settlement Lands are not "Indian lands" for purposes of that Act, *see* 25 U.S.C. § 1708(b).

I respectfully dissent.

SELYA, Senior Circuit Judge, dissenting.

I am in complete agreement with Judge Howard's cogent and articulate dissent, and I join it unreservedly. Nevertheless, I write separately to express my regret that, in taking far too narrow a view of the Settlement Act, the majority gives short shrift not only to the interests of the State of Rhode Island but also to the carefully calibrated arrangements crafted between the State and the Tribe.

We previously have made clear that the touchstone in resolving jurisdictional disputes between the State and the Tribe is the full effectuation of the parties' intent. *See Narrangansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22, 25 (1st Cir.2006) (en banc). Yet, today, the majority sets aside the parties' intent in favor of a wooden reading of one subsection of the Settlement Act. *See ante* at 37 ("By its terms, section 1708(a) applies state law only to the 1800 acres of 'settlement lands.' The Parcel is not part of the settlement lands.").

Despite the artful draftmanship of the majority opinion, the provision on which it relies cannot be wrested from its historical context and read in a vacuum. The Settlement Act, when taken together with the extinguishment of all Indian claims referable to lands in Rhode Island, the Tribe's surrender of its right to an autonomous enclave, and the waiver of much of its sovereign immunity, *see Narrangansett Indian Tribe*, 449 F.3d at 22, 24-25, suggests with unmistakable clarity that the parties intended to fashion a broad arrangement that preserved the State's civil, criminal, and regulatory jurisdiction over any and all lands within its borders. Therefore, the Settlement Act logically and equitably should be read to prohibit *any* unilateral action that would upset this hard-bargained and delicate jurisdictional balance.

The Secretary's taking of an after-acquired parcel into an unrestricted trust is just such an event. It strains credulity to surmise, as does the majority, that the State would have made such substantial

concessions-including the transfer, free and clear, of 1800 acres of its land-while leaving open the gaping loophole that today's decision creates.

The majority admits that this case is "in many ways a proxy for the State's larger concerns about its sovereignty," *ante* at 4, including the State's understandable worry that the Tribe will use this parcel (or future parcels that might be acquired and placed into trust) for activities that would be forbidden under State law and anathema to a majority of the State's citizens. At oral argument, the Secretary of the Interior and the Bureau of Indian Affairs appeared to disclaim any vestige of responsibility for the State's concerns. Despite this disclaimer and "the genuineness of the State's sense that its bargain has been upset," *ante* at 47, the majority turns its back on the State.

In my view, this is error-and error of the most deleterious kind. The majority, without anything approaching sufficient justification, is engaging in pointless literalism and forcing the State to rely on the faint velleity that the Secretary will use caution in the exercise of his responsibilities in connection with the Parcel. While "hope" is the official motto of Rhode Island, the State should not be force-fed hope in place of rights for which it has bargained.

As Indian tribes evolve in modern society, old legal rules tend to blur. The controversy that divides our court today is vexing and of paramount importance to both the State and the Tribe. Thus, the issue

– as well as the underlying principles of Indian law – doubtless would benefit from consideration by the Supreme Court. That is a consummation devoutly to be wished. In the meantime, however, there is too much at stake to allow the Tribe, with the contrivance of the Secretary's taking the Parcel into trust, to walk away from an arrangement that it helped to fashion and from which it has benefitted over the years.

I respectfully dissent.

United States Court of Appeals
For the First Circuit

No. 03-2647

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island; STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, a sovereign State of the United States; TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs-Appellants

v.

GALE A. NORTON, in her capacity as Secretary of the Department of the Interior, United States; FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of Interior, United States

Defendants-Appellees

Before

Boudin, *Chief Judge*,
Torruella, *Circuit Judge*,
Selya, *Senior Circuit Judge*,
Lynch, Lipez, and Howard, *Circuit Judges*.

ORDER OF COURT
Entered: August 16, 2007

The issuance of mandate is hereby stayed for appellants pending the timely filing of a petition for a writ of certiorari and, if a timely petition is filed, pending a resolution of the petition by the United

States Supreme Court. If the petition for certiorari is denied, mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellants are directed promptly to notify the clerk of this court both of the filing of any such petition for certiorari and the disposition.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ Margaret Carter
Chief Deputy Clerk

290 F.Supp.2d 167

United States District Court, D. Rhode Island.
Donald L. CARCIERI, in his capacity as Governor of the State of Rhode Island; State of Rhode Island and Providence Plantations, a sovereign state of the United States of America; and Town of Charlestown, Rhode Island,

v.

Gale A. NORTON, in her capacity as Secretary of the Department of the Interior, United States of America; and Franklin Keel, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of the Interior, United States of America.

C.A. No. 00-375ML.

Sept. 29, 2003.

Neil F.X. Kelly, Attorney General's Office, Providence, RI, for State of R.I.

Bruce N. Goodsell, Westerly, RI, Peter D. Ruggiero, Warwick, RI, Joseph S. Larisa, Jr., Providence, RI, for Town of Charlestown.

Anthony C. DiGioia, Asst. U.S. Attorney's Office, Providence, RI, Charles Jakosa, U.S. Dept. of Justice, Environment & Natural Resources Division, Washington, DC, Judith Rabinowitz, U.S. Dept. of Justice, Environment & Natural Resources Division, San Francisco, CA, for defendant.

John F. Killoy, Wakefield, RI, for Narragansett Indians.

MEMORANDUM AND ORDER

LISI, District Judge.

This is an action brought pursuant to 5 U.S.C. § 702, the Administrative Procedure Act ("APA"). The plaintiffs, Donald L. Carcieri[1], in his capacity as Governor of the State of Rhode Island, the State of Rhode Island ("the state"), and the Town of Charlestown ("the town") challenge a final determination of the Secretary of the Department of the Interior ("the secretary") to accept a 31-acre parcel of land ("the parcel") located in Charlestown, Rhode Island into trust for the benefit of the Narragansett Indian Tribe of Rhode Island ("the Narragansetts" or "the tribe").[2] Presently before the Court for determination are the parties' cross-motions for summary judgment. For the reasons that follow: (1) the plaintiffs' motion is denied; and (2) the motion of the defendants, Gale Norton in her capacity as Secretary of the United States Department of the Interior, and Franklin Keel in his capacity as Eastern Area Director of the Department of the Interior, Bureau of Indian Affairs ("the BIA" or "the bureau") is granted.

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[1] By stipulation, Donald L. Carcieri, has been substituted for the former governor, Lincoln Almond.

[2] The parcel is described as Assessor's Plat 117, Lot 119. *Town of Charlestown v. E. Area Dir. Bureau of Indian Affairs*, IBIA 98-88-A and 98-89-A, 35 IBIA 93 (2000).

I. *Background.*

In 1975, the Narragansetts, asserting claims of aboriginal title to approximately 3,200 acres of land located in Charlestown, instituted two lawsuits in this Court.[3] The parcel was part of the realty to which the tribe asserted aboriginal right.

On February 28, 1978, the parties to the then-pending federal litigation entered into a Joint Memorandum of Understanding ("JMOU") that was intended to achieve settlement of both actions. The JMOU provided for the acquisition of approximately 900 acres of state-held land and approximately 900 acres of privately-held land[4] (collectively, "the settlement lands"). The settlement lands were to be held in trust for the benefit of the tribe by a state-chartered entity, the Narragansett Indian Land Management Corporation, which was created for such purposes. JMOU ¶¶ 1, 8. The parcel was not part of the settlement lands.

In exchange, the Narragansetts agreed to the enactment of federal legislation "that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and

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[3] *Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I.); *Narragansett Tribe of Indians v. R.I. Dir. of Envtl. Mgmt.*, C.A. No. 75-0005 (D.R.I.).

[4] Federal funds, in the amount of $3,500,000.00, were appropriated for the purpose of acquiring the privately-held settlement lands. 25 U.S.C. §§ 1702(d), 1703, 1704, 1707, 1710.

effectively clears the titles of landowners in Rhode Island of any such claim." *Id.* ¶ 6. Subsequently, both Congress and the Rhode Island General Assembly enacted implementing legislation. Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716 (2000) (effective September 30, 1978) ("the Settlement Act"); R.I. Gen. Laws §§ 37-18-1 to 37-18-15 (1997) (effective 1979). The Settlement Act extinguished all of the Narragansetts' claims of aboriginal right to lands. 25 U.S.C. § 1705(a)(3).

In 1983, the Narragansetts obtained federal recognition as an Indian tribe. *See* 48 Fed.Reg. 6177-78 (Feb. 2, 1983). Thereafter, the Narragansett Indian Land Management Corporation was dissolved and the lands that had been held by the corporation on the Narragansetts' behalf were transferred to the tribe. R.I. Gen. Laws §§ 37-18-12, 37-18-13, 37-18-14. In 1988, following application by the tribe, the settlement lands were accepted into trust by the secretary for the Narragansetts' benefit pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465 (2000).

In 1991, the 31-acre parcel that is the subject of the instant litigation was purchased from a private developer by the Narragansett Indian Wetuomuck Housing Authority ("the WHA") for the purpose of constructing a housing complex. *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 911 (1st Cir.1996). The parcel is adjacent to the settlement lands but separated from them by a town road. *Id.*

The WHA was established by the Narragansetts and was recognized by the United States Department of Housing and Urban Development ("HUD") as an Indian housing authority. *Id.* HUD provided the financing for the purchase of the parcel and the construction of the housing units on the site. *Id.*[5]

In 1992, the WHA conveyed the parcel to the tribe with a deed restriction that the property be placed in trust with the federal government for the express purpose of providing housing for tribal members. *Id.*; Defs.' Statement Undisputed Facts, ¶ 17. The tribe leased the parcel back to the WHA with the approval of the BIA. 89 F.3d at 911; Defs.' Statement Undisputed Facts, ¶ 17.

The WHA began construction of the housing development without obtaining, *inter alia,* a building permit from the town or the state's approval of the individual sewage disposal systems serving the project. 89 F.3d at 912. The state and the town sought injunctive relief prohibiting the Narragansetts and the WHA from constructing a housing complex without obtaining various permits and approvals that were required by state law and local ordinances. *See Narragansett Indian Tribe v. Narragansett Elec. Co.,*

[5] Initially, funding was provided pursuant to the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-ee, repealed by Pub.L. 104-330 (1996). The Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243 (2000) (enacted by Pub.L. 104-330) provides the present funding mechanism.

878 F.Supp. 349 (D.R.I.1995), *rev'd in part, aff'd in part,* 89 F.3d 908 (1st Cir.1996). The WHA and the tribe contended that such permits and approvals were not required because the development was located on tribal land and state jurisdiction was precluded by the doctrine of Indian sovereignty. 878 F.Supp. at 354.

Resolution of the dispute required, *inter alia,* a determination of whether the parcel fell within the definition of "Indian country" set forth in 18 U.S.C. § 1151. *Id.* at 355. Congress has defined "Indian country" to include: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United Sates . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . " 18 U.S.C. § 1151 (2000).

The district court determined that the housing site was a "dependent Indian community" within the meaning of § 1151(b). 878 F.Supp. at 356-57. After addressing the applicability in "Indian country" of the several state and local regulations at issue, the court permanently enjoined the WHA, the tribe, their officers, members, agents and those acting in concert with them from: (1) occupying or permitting occupation of any housing units on the site until all applicable requirements of Rhode Island's coastal resources management program had been satisfied; and (2) interfering with the drainage easement previously conveyed to the town. *Id.* at 366. The court denied injunctive relief with regard to the tribe's and the

WHA's failure to comply with the requirements of any state regulations promulgated pursuant to the Historic Preservation Act, the Clean Water Act, the Safe Water Drinking Act, and those provisions of the state building code and the town zoning ordinance that were at issue in the case. *Id.*

On appeal, the First Circuit concluded that the parcel was not a "dependent Indian community" and thus not "Indian country" within the meaning of 18 U.S.C. § 1151(b). 89 F.3d at 911. Accordingly, the court of appeals reversed the district court's decision to the extent that the trial court had denied injunctive relief and the trial court was directed to enter an order granting the injunction.[6] *Id.* at 922.

A. *The Present Dispute.*

Pursuant to 25 U.S.C. § 465, the Secretary of the Department of the Interior is authorized to acquire lands into trust "for the purpose of providing land for Indians." The BIA renders trust acquisition determinations on the secretary's behalf. In 1993, the tribe submitted an application requesting that the secretary take the parcel into trust for the Narragansetts' benefit. The tribe filed an updated application in July 1997. The present litigation pertains to the latter application.

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[6] That portion of the district court's decision which granted injunctive relief was affirmed.

On March 6, 1998, the BIA, through its eastern area director, Franklin Keel, notified the tribe, the state and the town of the secretary's intent to take the parcel into trust for the benefit of the Narragansetts. The town and the state, including its then-governor, Lincoln Almond, appealed the decision to the Interior Board of Indian Appeals ("the IBIA" or "the board"). On June 29, 2000, the board affirmed the BIA's determination. *Town of Charlestown v. E. Area Dir., Bureau of Indian Affairs,* IBIA 98-88-A and 98-89-A, 35 IBIA 93 (2000).

In affirming the BIA's decision, the board rejected the plaintiffs' challenges to several determinations made by the BIA in accepting the parcel into trust.[7] Specifically, the board concluded that the Settlement Act did not prohibit the secretary from acquiring lands other than the settlement lands into trust for the benefit of the Narragansetts. 35 IBIA 100-101. Also, the board rejected plaintiffs' argument that the BIA, either in all trust acquisition proceedings, or in view of the specific circumstances surrounding the tribe's trust application, was required to consider the possible use of the parcel for gaming purposes under the Indian Gaming Regulatory Act ("the IGRA"), 25 U.S.C. § 2701 *et seq.,* and to impose a restriction precluding such use. 35 IBIA at 101-103.

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[7] Noting that it lacked jurisdiction to do so, the board did not address appellants' challenge to the constitutionality of 25 U.S.C. § 465. 35 IBIA at 96-97.

Further, the board concluded that the BIA did not violate the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* 35 IBIA at 104-105. Specifically, the bureau was not required to prepare a federal consistency determination for the proposed housing project as a prerequisite to trust acquisition of the parcel. *Id.* at 105.

Thereafter, plaintiffs instituted the instant action. As set forth more fully below, the plaintiffs allege that the secretary's acceptance of the parcel into trust was arbitrary, capricious, an abuse of discretion and/or otherwise not in accordance with law. Also, plaintiffs allege that the secretary lacked statutory authority to accept the parcel into trust and that the acquisition contravened the United States Constitution. Further, plaintiffs contend that 25 U.S.C. § 465 amounts to an unconstitutional delegation of legislative power to the executive branch of the federal government. The plaintiffs seek reversal of the secretary's decision and declaratory and injunctive relief.

II. *Discussion*

Summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it "might affect the outcome of the

suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The fact that both parties to a lawsuit move for summary judgment simultaneously does not relax the standards set forth in Rule 56. *See Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir.1996). On the contrary, the Court "must consider each motion separately, drawing all inferences against each movant in turn." *Id.* (quoting *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 n. 8 (1st Cir.1995)). The Court therefore "must view all facts and draw all inferences in the light most favorable to the nonmoving party." *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 6 (1st Cir.1997) (citing *Continental Cas. Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370, 373 (1st Cir.1991)).

The moving party bears the burden of showing the Court that no genuine issue of material fact exists. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Once the movant has made the requisite showing, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "Summary judgment is not appropriate merely because the facts offered by the moving party seem most plausible, or because the opponent is unlikely to prevail at trial."

Gannon v. Narragansett Elec. Co., 777 F.Supp. 167, 169 (D.R.I.1991) (citation omitted).

The Court's review of the secretary's determination is governed by 5 U.S.C. § 706 (2000), which provides in pertinent part:

> **Scope of review**
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall
>
> . . .
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

A. *Whether the Secretary's Determination was Arbitrary, Capricious, an Abuse of Discretion or Otherwise not in Accordance with Law.*

The scope of the Court's review under § 706(2)(A) is highly deferential. *E.g., Conservation Law Found. of New England, Inc. v. Sec'y of Interior,* 864 F.2d 954, 957-58 (1st Cir.1989) (citations omitted). The Court presumes the agency's action to be valid. *Id.* A reviewing court "cannot substitute its own judgment for that of the agency." *Id.* at 958 (citation omitted). Rather, the Court "must determine whether the decision was based on a consideration of the relevant factors and whether the agency made a clear error of judgment." *Airport Impact Relief, Inc. v. Wykle,* 192 F.3d 197, 202 (1st Cir.1999) (citations omitted).

However, a reviewing court will not merely "rubber stamp" an agency decision. *Id.* at 203.

If the Department "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency" we would

be compelled to find its decision arbitrary and capricious. *P.R. Higher Educ. Assistance Corp. v. Riley,* 10 F.3d 847, 850 (D.C.Cir.1993) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

In alleging that the secretary's actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, the plaintiffs cite several examples of the BIA's alleged failure to conduct an appropriate evaluation of the tribe's trust application. Specifically, plaintiffs complain that the BIA failed to properly examine the tribe's application in accordance with the factors enumerated in 25 C.F.R. § 151.10.[8] Moreover, plaintiffs contend that the BIA failed to conduct an independent evaluation of the tribe's application, relying instead on correspondence submitted by the tribe in support of its 1993 application, and disregarding issues arising and comments submitted by plaintiffs subsequent to 1993. Further, the plaintiffs allege that the BIA failed to assess the environmental impact of the proposed use of the parcel although the National Environmental Protection Act ("NEPA") and related regulations so required. Also, plaintiffs contend that the BIA abused its discretion in not causing a federal consistency

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[8] Challenging the bureau's determination that the parcel is contiguous to the tribe's reservation, plaintiffs contend that the tribe's trust application should have been examined under 25 C.F.R. § 151.11 rather than § 151.10. However, the plaintiffs concede that the two provisions are substantially similar. Plfs.' Jt. Mem. Supp. M. Summ. J. at 24 n. 30.

review to be conducted prior to accepting the parcel into trust. Additionally, plaintiffs allege the BIA improperly failed to consider that the tribe and the town had not executed a local cooperation agreement. Finally, plaintiffs complain that the bureau failed to consider that trust acquisition of the parcel would render the property available for gaming use under the IGRA.

1. *The BIA's Alleged Failure to Conduct an Independent Evaluation of the Application and to Properly Evaluate the Trust Application in Accordance with 25 C.F.R. § 151.10.*

In contending that the BIA failed to conduct an independent evaluation of the tribe's 1997 trust application, the plaintiffs point out that substantial portions of an undated memorandum from the bureau's area realty officer to the eastern area director concerning the matter are verbatim restatements of arguments proffered by the tribe's legal counsel in support of its 1993 trust application. *Cf.* Admin. Rec., Vol. I, Tab D (11/4/93 Letter from Attorney John F. Killoy, Jr. to Bill D. Ott, Area Director, BIA Eastern Area Office) with Admin. Rec., Vol. II, Tab H (Undated Memorandum from Bill Wakole, Area Realty Officer to Area Director, Eastern Area Officer). In particular, plaintiffs allege that the BIA's determination to accept the parcel into trust was premised solely on the tribe's 1993 correspondence, and was made without consideration of other relevant factors,

including those issues presented by plaintiffs in their comments regarding the 1997 application.

The plaintiffs' assertions that the bureau failed to conduct an independent evaluation of the trust application, including plaintiffs' claim that the BIA failed to consider those issues raised in plaintiffs' comments, are belied by the administrative record. *See e.g.*, Admin. Rec., Vol. II, Tab L; Vol. III, Tab U, Exh. 19. After examining the record in its entirety, the Court is satisfied that the BIA's determination was based upon its own independent analysis and evaluation of the 1997 application.

Further, plaintiffs allege that, in evaluating the trust application, the BIA failed to adequately consider the factors enumerated in 25 C.F.R. § 151.10. Specifically, plaintiffs assert that the bureau failed to assess the tribe's need for additional land and the potential jurisdictional problems and land use conflicts which might arise. The regulation provides, in pertinent part:

> On-reservation acquisitions.
>
> . . .
>
> The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
>
> > (a) The existence of statutory authority for the acquisition and any

> limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> . . .
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> . . .

25 C.F.R. § 151.10

In reviewing the BIA's decision, the Court determines only whether the agency's decision was based on a consideration of the factors enumerated in § 151.10 and whether there has been a clear error of judgment. *McAlpine v. United States,* 112 F.3d 1429, 1436 (10th Cir.1997) (quoting *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). The Court does not engage in a weighing or balancing of the factors. *Id.* at 1434 (citing *Turri v. I.N.S.,* 997 F.2d 1306, 1308-09 (10th Cir.1993)). "The court's obligation is not to engage in *de novo* review to satisfy itself that the agency made the correct decision, but only to ascertain that the decision made was based on rational consideration of the statutorily relevant factors." *City of Lincoln City v. U.S. Dep't of Interior,* 229 F.Supp.2d 1109, 1126 (D.Or.2002).

The record evinces that the BIA complied with § 151.10. Moreover, plaintiffs' arguments on this issue are, in substance, impermissible challenges to the *conclusions* reached by the BIA as a result of its consideration of the § 151.10 factors. The fact that the bureau, after conducting its own independent inquiry and analysis, reached conclusions similar to those urged by the tribe and contrary to those urged by plaintiffs does not by itself lead to an inexorable finding that the BIA's determination was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

2. *NEPA and the CZMA.*

The plaintiffs contend that the BIA's failure to require an environmental impact statement ("EIS") as a prerequisite to its trust determination violated NEPA, 42 U.S.C. § 4321 *et seq.* Moreover, plaintiffs allege that the bureau, in concluding that no EIS was

necessary, improperly relied on an environmental assessment submitted by the tribe instead of conducting its own independent inquiry. NEPA provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> > (i) the environmental impact of the proposed action,
> >
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> >
> > (iii) alternatives to the proposed action,
> >
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332 (2000).

An EIS need not be prepared in all circumstances. Rather, an EIS is required only where the proposed action will have a significant impact on the environment. *Londonderry Neighborhood Coalition v. Fed. Energy Regulatory Comm'n,* 273 F.3d 416, 419 (1st Cir.2001) (quoting *Wyoming Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 49 (D.C.Cir.1999)). An environmental assessment ("EA") is employed in determining this threshold issue.[9] *Id.* The EA need not be prepared by the federal agency itself. The assessment may be prepared by the applicant provided that the agency "make[s] its own evaluation of the environmental issues and take[s] responsibility for the scope and content of the environmental assessment." 40 C.F.R. § 1506.5(b).

In the instant matter, the tribe prepared and submitted an EA. Admin. Rec., Vol. II, Tab D, Exh. 9. The BIA reviewed the Narragansetts' assessment, sought and obtained additional environmental information from the tribe and, after conducting its own review of all pertinent information, independently

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[9] Apparently, the parties agree that the acceptance of the parcel into trust amounts to a "major Federal action" within the meaning of 42 U.S.C. § 4332(2)(C).

concluded that no EIS was necessary. Admin. Rec., Vol. I, Tab S; Vol. I, Tab U; Vol. I, Tab Y; Vol. II, Tab B; Vol. II, Tab D, Exhs. 10, 11. The plaintiffs have failed to demonstrate that the BIA acted arbitrarily, capriciously or abused its discretion either in analyzing the issue or in determining that preparation of an EIS was not required. The handwritten comments, attributed to Jim Harriman, BIA Trust Services Environmental Officer, that appear on the face of the EA do not require a contrary conclusion. *See* Admin. Rec., Vol. I, Tab L.

The plaintiffs assert that the CZMA, 16 U.S.C. §§ 1451 *et seq.*, required the completion of a federal consistency review of the contemplated 50-unit housing project as a prerequisite to the secretary's trust determination.[10] However, plaintiffs have not demonstrated

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[10] The CZMA provides, in pertinent part:

Coordination and cooperation

(c) Consistency of Federal activities with State management programs . . .

(3)**(A)** Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

. . .

(C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated

(Continued on following page)

that a consistency review of the anticipated development was necessary at the trust acquisition stage. The Rhode Island Coastal Resources Management Council ("the RICRMC"), the agency responsible for administering the state's coastal resources management plan, found that the application for trust status was consistent with the state's plan. Admin. Rec., Vol. II, Tab D, Exh. 11. As the CRMC recognized, development of the parcel was a separate matter which required its own federal consistency determination. *Id.* HUD's obligations under the CZMA are not before the Court for consideration.

3. *The Potential Use of the Parcel for Gaming Purposes.*

The plaintiffs assert that the bureau abused its discretion in accepting the parcel into trust without considering the potential use of the parcel for gaming activity under the IGRA, 25 U.S.C. §§ 2701-2721 (2000). Although not clear from the plaintiffs' memoranda, the Court views plaintiffs' argument as a challenge both to the BIA's determination that the tribe intended to use the parcel for housing purposes, *see* 25 C.F.R. § 151.10(c), and to its acceptance of the

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under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

16 U.S.C. § 1456 (2000).

parcel into trust without restricting the use of the land to non-gaming purposes.

The IGRA was enacted by Congress in 1988, and, subject to certain restrictions, permits Indian tribes to engage in gaming activity on "Indian lands." 25 U.S.C. § 2710. "Indian lands" are defined as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."[11] 25 U.S.C. § 2703(4). However, except as otherwise provided in § 2719, "gaming regulated by [the IGRA] shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless . . . such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a)(1).

The parties disagree as to whether the parcel satisfies the contiguity exception set forth in § 2719(a)(1). That issue is not before this Court for determination. The question is one to be determined at some future date, if and when the tribe seeks to use the parcel for gaming purposes. It is clear from

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[11] As the plaintiffs correctly note, the settlement lands have been expressly excluded from the IGRA's definition of "Indian lands." 25 U.S.C. § 1708(b) (effective Sept. 30, 1996).

the record that the BIA was aware of the probability that, if accepted into trust, the parcel would qualify for use for gaming activities under the IGRA. *E.g.*, Admin. Rec., Vol. II, Tabs I, K, L. The bureau was cognizant of the plaintiffs' opposition to use of the realty for such purposes. However, there was no evidence that the tribe intended to use the parcel for other than tribal housing. In fact, after the plaintiffs expressed concern over the potential for development of a gaming facility on the parcel, the tribe reaffirmed that it intended to use the parcel for a housing development and stated that it had "no immediate plans for any further future development." Admin. Rec., Vol. II, Tab N.

In sum, although the possibility that the parcel might be used for gaming activities was raised before the BIA, the bureau's determination that the parcel would be used to provide housing was amply supported by the record. In view of the deferential standard of review afforded to agency decisions under the APA, the bureau's determination in this regard must be sustained. Similarly, the bureau's acceptance of the parcel into trust without imposing a land use restriction precluding gaming activity did not amount to an abuse of discretion. *Cf. Village of Ruidoso, New Mexico v. Albuquerque Area Dir., Bureau of Indian Affairs,* 32 IBIA 130, 1998 WL 233740 (1998) (although tribe orally denied any intention to use subject parcel for gaming purposes, several facts, including that the parcel was a gift to the tribe from a corporation which apparently had a business relationship with the tribe,

and that the parcel was adjacent to and possibly being used to provide parking and shuttle service for tribe's on-reservation resort which housed a casino, required further BIA inquiry into whether the parcel would be used for gaming related activities).

4. *The Absence of a Local Cooperation Agreement.*

At the time of the bureau's determination, NAHASDA precluded HUD from providing housing grants absent the execution of a local cooperation agreement between the tribe and the municipality in which the housing was situated. *See* 25 U.S.C. § 4111(c), as amended through Pub.L. 105-276 (Oct. 21, 1998). No such agreement was executed between the tribe and the town concerning the parcel. The plaintiffs contend that, in deciding to accept the parcel into trust, the BIA improperly failed to consider the absence of a local cooperation agreement.

This argument is unpersuasive for at least two reasons. First, 25 U.S.C. § 4111(c) establishes a prerequisite to HUD's award of housing grants. It does not pertain to the BIA's trust acquisition authority. Second, § 4111(c) has been amended to permit HUD to waive the cooperation agreement requirement, 25 U.S.C. § 4111(c), as amended, Pub.L. 106-569, Dec. 27, 2000, and it appears that the tribe has obtained such a waiver.

B. *The Secretary's Authority to Accept the Parcel into Trust for the Benefit of the Narragansetts.*

The plaintiffs proffer two arguments in support of their claim that the secretary lacked legal authority to accept the parcel into trust for the benefit of the Narragansetts pursuant to 25 U.S.C. § 465.[12] First, plaintiffs contend that the trust acquisition authority conferred under § 465 is limited to acquisitions for the benefit of tribes that were federally recognized as of June 1934. Second, plaintiffs argue that the Settlement Act operates to preclude the secretary from acquiring additional land in trust for the benefit of the tribe.

1. *The Scope of the IRA.*

Section 465 provides in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water

[12] Also, in their reply memorandum in support of their summary judgment motion and their objection to defendants' summary judgment motion, plaintiffs assert that 25 U.S.C. § 465 does not authorize the secretary to accept into trust any lands that are owned in fee by a tribe. This claim was not specifically delineated in plaintiffs' complaint and was not addressed by the parties at oral argument. In any event, plaintiffs have not proffered any case law in support of their assertion and the Court finds that plaintiffs' argument is unsupported by the clear language of § 465.

> rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> . . .
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired. . . .

25 U.S.C. § 465.

The applicable definitions of "Indian" and "tribe" are set forth in 25 U.S.C. § 479:

> The term "Indian" . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . The term "tribe" . . . shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

25 U.S.C. § 479 (2000).

In substance, plaintiffs contend that the phrase "members of any recognized Indian tribe now under Federal jurisdiction" restricts the secretary's trust-taking authority to acquisitions made on behalf of tribes that were federally recognized as of the time of

the IRA's enactment in June 1934. Under plaintiffs' analysis, any tribe, including the Narragansetts, that was afforded federal recognition subsequent to June 1934 does not qualify as an "Indian tribe" pursuant to § 479.

The plain language of § 479 does not impose such a limitation. The statute includes within the definition of "Indian," members of tribes in existence in 1934. When, as in the Narragansetts' case, a tribe existed in June 1934, and that tribe subsequently attained federal recognition, the fact that such acknowledgment occurred subsequent to the IRA's enactment date does not preclude trust acquisition for the benefit of the tribe pursuant to § 465. *See City of Sault Ste. Marie v. Andrus,* 532 F.Supp. 157, 161 (D.D.C.1980) ("[A]lthough the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934."); *see also R.I. v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir.1994) ("Federal recognition is just that: recognition of a previously existing status").

The Fifth Circuit's analysis and determination in *United States v. State Tax Comm'n of Miss.,* 505 F.2d 633 (5th Cir.1974), does not support a contrary conclusion. In *State Tax Comm'n,* the district court enjoined the Mississippi State Tax Commission and the Neshoba County sheriff from assessing or collecting sales and contract taxes from the Mississippi

Band of Choctaw Indians, the tribe's housing authority, and a non-profit corporation which had been formed by the tribal council for the purpose of engaging in the construction business. *Id.* at 635-37. On appeal, the Fifth Circuit reversed, concluding that the district court lacked subject matter jurisdiction. *Id.* at 643.

In so doing, the court of appeals concluded, *inter alia,* that the band was not an "Indian tribe" within the meaning of § 479 and, thus, that 28 U.S.C. § 1362 did not provide a basis for the district court's exercise of jurisdiction. *Id.* at 638. Specifically, the circuit court determined that: the band's tribal status had been extinguished by the United States Senate's ratification of the Treaty of Dancing Rabbit Creek in 1831; the Choctaws did not thereafter maintain a tribal organization or manner of living; in 1934, the band was not a tribe as defined by the IRA; and a 1944 proclamation by the Department of the Interior in which the department purported to recognize the tribe did not effectively confer the tribal status which was lacking in 1934. *Id.* at 640-43. With regard to the last point, the court of appeals stated: "The language of [25 U.S.C. § 479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect." *Id.* at 642.

Examined in the context of the court's analysis of the Choctaws' status, the above-quoted sentence does not evince that the Fifth Circuit understood § 479 as

limiting tribal status to those tribes which were both existing and officially recognized as of June 1934. Rather, the statement simply indicates that tribal status that did not exist at the time of the IRA's enactment could not be "created" after that date. Specifically, in view of the uncontroverted evidence that the Mississippi Choctaws' tribal status had been extinguished prior to the IRA's enactment date, the tribe did not fall within § 479 and any post-enactment attempt to revive that status was of no consequence. Immediately following the above-quoted sentence, the Fifth Circuit continued as follows:

> The Mississippi Choctaws did not, in June, 1934 fall within the status prescribed by the Act. Their vote in 1935 to accept the benefits of the Act was not authorized by that statute. They could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included.
>
> > This omission was not, and could not have been, cured by a Proclamation of the Department of the Interior, grounded on the Act of 1934, which in 1944 purported to recognize the tribal organization of the Mississippi Band of Choctaw Indians and which attempted to declare that the lands purchased for their use and held for them in trust is an Indian Reservation.

Id. at 642-43.[13]

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[13] In *United States v. John*, 437 U.S. 634, 650, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) the Supreme Court determined that

(Continued on following page)

Unlike the Mississippi Choctaws, there can be no serious dispute concerning the Narragansetts' tribal status in 1934. "[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177, 6178 (Feb. 10, 1983). "The tribe has a documented history dating from 1614." *Id.*

In sum, as a federally-recognized tribe which existed at the time of the enactment of the IRA, the Narragansett tribe qualifies as an "Indian tribe" within the meaning of § 479. Thus, the secretary

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the Mississippi Choctaws were "Indians" within the definition set forth in § 479. Specifically, the definition includes persons of "one-half or more Indian blood" and "[t]here is no doubt that persons of this description lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior, at the time the [IRA] was passed." *Id.*

Of relevance to the instant matter is the Supreme Court's accompanying observation that the IRA "defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *Id.* (parenthetical in original). The Supreme Court's parenthetical language provides some support for plaintiffs' assertion that whether a tribe was federally recognized in 1934 is determinative of its status. However, that issue was not before the Supreme Court for consideration and, in fact, the Court did not address the matter further. Under such circumstances, the district court declines to view the Supreme Court's parenthetical as determinative of the issue presented here.

possesses authority under § 465 to accept lands into trust for the benefit of the Narragansetts.[14]

2. *The Impact of the Settlement Act on the Secretary's Authority under 25 U.S.C. § 465.*

The plaintiffs contend that, even if the Narragansetts qualify as an "Indian tribe" within the meaning of § 479, the Settlement Act precludes the

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[14] The plaintiffs further contend that the legislative history of 25 U.S.C. § 479 reveals that Congress intended the term "Indian" to refer only to tribes federally recognized as of the date of the IRA's enactment. Since the Court finds no ambiguity on the face of the statute, it does not go further in an attempt to ascertain legislative intent. However, the Court has reviewed the Senate testimony referenced by plaintiffs and concludes that, contrary to plaintiffs' assertion of a more restrictive goal, the colloquy simply evinces a legislative intent to restrict the definition of "Indian" to members of aboriginal tribes, any of their descendants who are of at least one-half Indian blood, and any descendants of any degree of blood relationship who were residing on reservations as of June 1, 1934. Hearing before the Senate Committee on Indian Affairs, 73rd Congress, May 17, 1934, at 264-267; Plaintiffs' Appendix, Vol. V. *See City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 161 (D.D.C.1980) ("[T]he apparent purpose of limiting IRA benefits to tribes recognized in 1934 was to prevent new groups from coming together solely to exploit the IRA. . . .")

Similarly, because the Court concludes that § 479 defines "Indian" to include members of aboriginal tribes that possessed tribal status in 1934 but were recognized subsequent to that date, it is not necessary for the Court to address the parties' respective arguments concerning whether 25 U.S.C. §§ 476 and 2202 require that § 479 be afforded an expansive interpretation.

acceptance of non-settlement lands into trust for the benefit of the tribe under § 465. The plaintiffs proffer three primary arguments in support of this contention. First, plaintiffs argue that the Settlement Act and the underlying JMOU preclude any further expansion of the area over which the tribe possessed jurisdiction. The plaintiffs assert that the secretary's acceptance of the parcel into trust is contrary to the purposes of the enactment and JMOU because it results in such an expansion and an accompanying divestiture of the state's jurisdiction and sovereignty over the property.[15] Second, plaintiffs contend that 25 U.S.C. § 1707(c) specifically extinguished the federal government's authority to acquire additional, non-settlement lands in trust for the benefit of the tribe pursuant to § 465. Third, plaintiffs allege that the secretary is precluded from accepting the particular parcel at issue into trust because the parcel was part of the lands to which the tribe had asserted aboriginal title and that claim was resolved by the JMOU and the Settlement Act.

The Settlement Act provided for congressional ratification of any prior transfers of land or natural resources located anywhere in the United States that were made by or on behalf of the Narragansetts, their

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[15] *See Connecticut v. U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2nd Cir.2000) (citing 25 U.S.C. §§ 465, 1321(a), 1322(a); 25 C.F.R. § 1.4(a)) (noting that land taken into trust pursuant to the IRA is generally not subject to state or local taxation, local zoning and regulatory requirements, or, absent tribal consent, state criminal and civil jurisdiction.)

predecessors, or their successors in interest. 25 U.S.C. § 1705(a)(1). The enactment also provided for the ratification of any prior transfers of any land or natural resources located within the town of Charlestown that were made by any Indian, Indian nation, or Indian tribe. *Id.* The act provided for the extinguishment of any Indian claims of aboriginal title to such property as of the date of transfer. 25 U.S.C. § 1705(a)(2). The act further provided:

> [B]y virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. § 1705(a)(3).

Similarly, the enactment provided for the ratification of any transfers of land or natural resources located within Rhode Island and outside of the town of Charlestown that were made by or on behalf of any

Indian, Indian nation, or Indian tribe (other than transfers included in § 1705). 25 U.S.C. § 1712(a)(1). Aboriginal title to such land or natural resources was regarded as extinguished as of the date of transfer. 25 U.S.C. § 1712(a)(2). In addition:

> [B]y virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. § 1712(a)(3).

The Settlement Act does not expressly preclude or otherwise restrict the acceptance of non-settlement lands into trust for the benefit of the Narragansetts pursuant to 25 U.S.C. § 465. Moreover, plaintiffs have not demonstrated that either Congress or the settling parties intended to impose such a limitation.

In ascertaining congressional intent, courts are guided by the general principle that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States,* 534 U.S. 84, 93-94, 122

S.Ct. 528, 151 L.Ed.2d 474 (2001) (quotation and citations omitted). In particular, statutes that impact upon Indian sovereignty are viewed from a "distinctive perspective." *Narragansett Indian Tribe of R. I.*, 89 F.3d at 914 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 691 (1st Cir.1994)). "[I]t is well established that '[a] congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" *Id.* (quoting *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973)).

Although §§ 1705 and 1712 reveal an intent to resolve *all* claims, whether for possession or damages, that are premised upon the Narragansetts' assertions of aboriginal right, the provisions do not reveal an intent to otherwise restrict the tribe's legal rights and privileges, including those benefits which became available to the tribe upon attaining federal acknowledgment in 1983.[16] Specifically, the Settlement Act does not impair the tribe's ability, as a federally

[16] Similarly, the enactment's legislative history reveals that Congress' intent in passing the Settlement Act was to resolve the Narragansetts' aboriginal land claims. *See* H.R. Rep. 95-1453, U.S.Code Cong. & Admin. News 1978, pp. 1948, 1949 (purpose of Settlement Act was "to implement a settlement agreement between the Narragansett Indian Tribe and the State of Rhode Island and private landowners in Charlestown, Rhode Island concerning the tribe's claim to certain land within the Town of Charlestown and for damages for trespass on such lands").

recognized tribe, to seek § 465 trust acquisition of lands that it acquires by purchase with non-settlement funds.

The JMOU does not evince a contrary intent on the part of the settling parties. Paragraph 6 of the JMOU provides in pertinent part:

> Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claim.

> The provision reveals the settling parties' intention to resolve all claims arising out of the Narragansetts' assertions of aboriginal right to lands located within the state and to remove any clouds on the title to that realty. As is the case with §§ 1705 and 1712, paragraph 6 does not indicate an intent to otherwise limit the tribe's legal rights and privileges including those benefits incident to federal recognition. In fact, paragraph 15 demonstrates that the parties recognized that the Narragansetts were entitled to seek federal acknowledgment and its attendant benefits:[T]he plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of Interior services as a result of Congressional implementation of the provisions of this Memorandum, *but will have the same right to petition for such recognition and services as other groups.*

(Emphasis added).

The plaintiffs' reliance on 25 U.S.C. § 1708(a) to support their contention that the Settlement Act forecloses the acceptance of the parcel into trust pursuant to § 465 is misplaced because that provision is expressly limited in application to "settlement lands." Section 1708(a) provides: "Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." The provision does not speak to non-settlement acquisitions and, accordingly, does not evince a congressional intent to foreclose § 465 trust acquisitions of non-settlement lands on the Narragansetts' behalf. The plaintiffs argue that acceptance of non-settlement lands into trust will diminish the state's sovereignty and jurisdiction over one or more "islands" of land within the state's borders. However, the potential for such a result does not provide a basis for construing the Settlement Act as foreclosing future trust acquisitions. "[C]heckerboard jurisdiction is not novel in Indian law. . . ." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). "While we might question the wisdom of different jurisdictional provisions governing different trust lands, we will not provide a strained interpretation of the [Connecticut Indian Claims] Settlement Act simply to avoid such a result." *Connecticut v. U.S. Dep't of Interior*, 228 F.3d 82, 91 (2nd Cir.2000). Rather, plaintiffs' argument is more appropriately one for presentation to Congress in seeking amendment of the Settlement Act.

Next, plaintiffs contend that 25 U.S.C. § 1707(c) extinguished the secretary's authority to accept non-settlement lands into trust for the benefit of the Narragansetts. The provision provides:

> **Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes**
>
> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however,* That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however,* That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or

> private purposes pursuant to the laws of the State of Rhode Island.

25 U.S.C. § 1707(c).

Subsection 1707(c) does not expressly preclude the secretary from acquiring additional lands in trust for the benefit of the Narragansetts. *Cf.* 25 U.S.C. § 1724(e) ("Maine Indian Claims Settlement Act") ("Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine."). Moreover, such a restriction cannot be reasonably inferred.

As previously set forth, the Narragansetts did not obtain federal acknowledgment of their tribal status until 1983. Thus, at the time of the Settlement Act's enactment in 1978, the secretary lacked authority to accept lands into trust for the benefit of the tribe pursuant to § 465. However, the possibility that the tribe subsequently would obtain federal recognition was contemplated at the time of the Settlement Act's passage. *See* 25 U.S.C. § 1707(c) (expressly restricting conveyance of settlement lands to anyone other than the tribe in event of recognition). Having foreseen the possibility of future federal acknowledgment of the tribe, Congress could have expressly limited the secretary's authority to accept additional lands into trust for the Narragansetts' benefit. It did not do so and the Court will not infer such an intent.

This Court's determination is consistent with the Second Circuit's analysis in *Connecticut v. U.S. Dep't of Interior, supra.* In that matter, the court of appeals, in reversing the district court's determination, concluded that the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-60 ("the Connecticut Settlement Act"), did not preclude the secretary from accepting into trust certain lands which neither were within the boundaries of the area designated by the enactment as "settlement lands" nor had been purchased with settlement funds. *Connecticut,* 228 F.3d at 88. The Connecticut enactment extinguished the Mashantucket Pequot's aboriginal land claims. 25 U.S.C. § 1753. In exchange, the act, *inter alia,* established a fund designed primarily to acquire private lands on behalf of the tribe. 25 U.S.C. § 1754. The enactment designated lands within a specific geographical area as "settlement lands." 25 U.S.C. §§ 1752(3), (4). Lands contained within that geographical area that were purchased with settlement funds were to be held in trust by the United States for the benefit of the tribe. 25 U.S.C. § 1754(b)(7). However, lands acquired with settlement funds but located outside the area designated as "settlement lands" were to be held in fee by the tribe.

Mashantucket Pequot Settlement Fund

. . .

(b) Expending of Fund; private settlement lands; economic development plan; acquisition of land and natural resources

. . .

> (8) Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources.

25 U.S.C. § 1754(b)(8).

At issue in *Connecticut v. U.S. Dep't of Interior* was whether the Connecticut Settlement Act precluded the secretary from acquiring into trust lands owned in fee by the tribe that were neither acquired with settlement funds nor located within the area designated as "settlement lands." 228 F.3d at 87. The district court, finding that Congress intended the statute to establish the geographical limits of the tribe's sovereignty, concluded that § 1754(b)(8) precluded the secretary from acquiring non-settlement lands purchased with non-settlement funds into trust for the tribe's benefit. *Id.* The Second Circuit reversed, holding that the subsection applied only to lands purchased with settlement funds. *Id.* at 88. In so doing, the court of appeals found the Connecticut Settlement Act to be unambiguous on the issue. *Id.* Moreover, even if some ambiguity existed, principles of statutory construction supported the appellate court's interpretation. In particular, the Second Circuit, citing language contained in the Connecticut Settlement Act that is nearly identical to that set

forth in Rhode Island's Indian Claims Settlement Act, noted:

> The Settlement Act was not . . . a comprehensive statute intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty. Rather, it emerged from the specific land dispute arising out of the 1976 lawsuits filed by the Tribe. The congressional findings contained within the Settlement Act itself suggest that the purpose of the Act was more parochial than the Connecticut plaintiffs contend. The statute recites that "the pendency of [the Tribe's] lawsuit has placed a cloud on the titles to much of the land in the town of Ledyard, including lands not involved in the lawsuit, which has resulted in severe economic hardships for the residents of the town." . . . [T]he Act continues, "Congress shares with the State of Connecticut and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claims." . . . Congress saw the Settlement Act as providing the necessary federal implementation of the private agreement negotiated between the parties that would end the existing lawsuit. . . . Nothing in the Act indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory.

Id. at 90; *cf.* 25 U.S.C. § 1701.

Finally, the plaintiffs assert that, regardless of whether the Settlement Act imposes a general prohibition on the secretary's acceptance of lands into trust

for the benefit of the Narragansetts, acquisition of the specific parcel at issue in this proceeding is precluded by the doctrine of res judicata or, as described by plaintiffs at oral argument, an analogous theory. *Tr.* (10/9/2002) at 24-25. The plaintiffs note that the parcel was among the lands to which the tribe asserted a claim of aboriginal right in the 1975 litigation. Because the Narragansetts' claims concerning the parcel were among those resolved by the JMOU and the Settlement Act, plaintiffs contend that the tribe is precluded from now attaining sovereignty over the parcel through trust acquisition.

The plaintiffs' argument is without merit. "[T]he doctrine of res judicata operates to bar the relitigation of issues that were or could have been raised in an earlier action between the same parties prescinding from the same set of operative facts." *In re Carvalho,* 335 F.3d 45, 49 (1st Cir.2003) (citations omitted). The federal government was not a party to the 1975 litigation or to the JMOU.[17] Moreover, the secretary's fee-to-trust acquisition of the parcel and the consequences of that action are matters that are separate and distinct from the claims of aboriginal right which the JMOU and the Settlement Act were intended to resolve.

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[17] Additionally, the Narragansetts are not a party to the instant action.

C. *The IRA and the Nondelegation Doctrine.*

The plaintiffs contend that 25 U.S.C. § 465 amounts to an unconstitutional delegation of legislative authority to the executive branch of the federal government. Specifically, the plaintiffs assert that the statute confers decision-making authority upon the secretary without articulating sufficient standards to guide the secretary's trust determinations.

Article I, Section I, of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency . . . [Article I, Section I] permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (citations omitted). Accordingly, "when Congress confers decision-making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)).

In support of their claim that § 465 amounts to an impermissible delegation of congressional authority to the secretary, the plaintiffs rely primarily on the Eighth Circuit's determination to that effect in *South Dakota v. U.S. Dep't of Interior,* 69 F.3d 878

(8th Cir.1995). However, on certiorari, the Supreme Court vacated the circuit's decision. 519 U.S. 919, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996) (granting petition for certiorari, vacating judgment and remanding matter to the Secretary of the Interior for reconsideration of the secretary's administrative decision). The Supreme Court did not publish an opinion setting forth the majority's reasoning on the issue.

Following the Supreme Court's decision in *South Dakota*, the Tenth Circuit addressed the validity of Congress' delegation of trust acquisition authority under § 465. *United States v. Roberts*, 185 F.3d 1125 (10th Cir.1999). In *Roberts*, the Tenth Circuit upheld a district court determination that the delegation was proper. In so doing, the court of appeals noted that the statute itself placed ample limits on the secretary's exercise of discretion. *Id.* at 1137 (citations omitted).

This Court finds the Tenth Circuit's analysis to be persuasive. Accordingly, for the same reasons articulated in *Roberts*, the Court rejects plaintiffs' claim that § 465 is an unconstitutional delegation of legislative authority to the secretary.

D. *The Constitutionality of the Trust Acquisition.*

The plaintiffs contend that acceptance of the parcel into trust amounts to a violation of Article I, Section 8, Clause 17 ("the Enclave Clause"), and

Article IV, Section 3, Clause 1 ("the Admissions Clause"), of the United States Constitution.[18] Also, plaintiffs allege that the action is violative of the Tenth Amendment.[19] In substance, plaintiffs allege that the trust acquisition will result in a diminishment of the state's sovereignty without its consent, in violation of these provisions and in excess of Congress' authority under Article I, Section 8, Clause 3 ("the Indian Commerce Clause"), of the Constitution.

1. *The Enclave Clause.*

The Enclave Clause provides Congress with the authority:

> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

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[18] The plaintiffs' complaint does not specifically allege violation of Article IV, Section 3, however, the parties have fully briefed and argued this issue.

[19] In Count XI of their complaint, the plaintiffs assert that the secretary's action is violative of the Eleventh Amendment. However, the plaintiffs failed to articulate the basis for this claim in their complaint, in their memoranda, or during oral argument. Accordingly, the Court determines that the Eleventh Amendment claim has been waived.

> Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. Const. Art. I, § 8, cl. 17. Absent state consent, the clause precludes the federal government from establishing within a state an enclave which is exclusively subject to federal jurisdiction. *Surplus Trading Co. v. Cook,* 281 U.S. 647, 652, 50 S.Ct. 455, 74 L.Ed. 1091 (1930); *City of Roseville v. Norton,* 219 F.Supp.2d 130, 149 (D.D.C.2002). The relevant inquiry is whether "the United States has acquired *exclusive* legislative authority so as to debar the State from exercising *any* legislative authority including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory." *Silas Mason Co. v. Tax Comm'n of Wash.,* 302 U.S. 186, 197, 58 S.Ct. 233, 82 L.Ed. 187 (1937) (emphasis added). A less than complete ouster of the state's jurisdiction does not trigger Enclave Clause concerns. *City of Roseville,* 219 F.Supp.2d at 150-51.

The Supreme Court has described an Indian reservation as an example of an area not amounting to a federal enclave. *Surplus Trading Co.,* 281 U.S. at 650-51, 50 S.Ct. 455. More recently, in *Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court reaffirmed that the states retain a degree of jurisdiction over reservation lands.

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory

> authority on the reservation. State sovereignty does not end at a reservation's border. . . .
>
> That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."

Id. at 361-62, 121 S.Ct. 2304 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

Accordingly, because such an action does not result in a complete ouster of state jurisdiction, this Court agrees with the district court's conclusion in *City of Roseville* that the acceptance of land into trust for the benefit of an Indian tribe does not amount to the creation of a federal enclave. 219 F.Supp.2d at 150. Therefore, the secretary's acceptance of the parcel into trust for the benefit of the Narragansetts does not amount to a violation of the Enclave Clause. *See id.* at 152.

2. *The Admissions Clause.*

Article IV, Section 3, Clause 1 of the Constitution provides:

> Admission of new states.
>
> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

In contending that the acceptance of the parcel into trust is violative of the Admissions Clause, plaintiffs attempt to equate trust status and its attendant diminishment of state jurisdiction with the creation of a new, independent state. In part, plaintiffs premise their claim on the probability that, once placed in trust, the parcel will qualify as a "dependent Indian community" and, thus, as "Indian country" as defined by 18 U.S.C. § 1151 *See Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.,* 89 F.3d at 920.

In any event, plaintiffs' claim fails because it is based upon an overly broad definition of "state" as that term is employed in Article IV, Section 3. As used therein, "state" refers to a body *equal* in power to those of the existing states. *Coyle v. Smith,* 221 U.S. 559, 566-67, 31 S.Ct. 688, 55 L.Ed. 853 (1911). *City of Roseville,* 219 F.Supp.2d at 152. Article IV, Section 3, confers upon Congress the power to admit "[n]ew

States . . . into this Union." " 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle,* 221 U.S. at 567, 31 S.Ct. 688. Conversely, the power to admit states does not confer authority "to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union." *Id.* at 566, 31 S.Ct. 688.

As set forth in *Nevada v. Hicks, supra,* tribal lands remain subject to some degree of state regulation. Thus, there can be no serious dispute that trust acquisition does not confer statehood status. "[T]he taking of land into trust [for the benefit of the tribe] in no way creates an entity equal to the State . . . or to the other states in the union." *City of Roseville,* 219 F.Supp.2d at 153; *see White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (noting that "[t]ribal reservations are not States").

3. *The Tenth Amendment.*

Finally, plaintiffs allege that the secretary's acceptance of the parcel into trust amounts to an abrogation of the state's sovereignty in violation of the Tenth Amendment to the United States Constitution, and in excess of the federal government's authority under the Indian Commerce Clause.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft,* 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

> In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. United States, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The Constitution confers upon Congress the power "[t]o regulate commerce . . . with the Indian tribes." U.S. Const. Art. I, Sec. 8, Cl. 3. It is well settled that Congress has "plenary power . . . to deal with the special problems of Indians." *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). This includes the power to legislate. *Id.* at 552, 94 S.Ct. 2474. Accordingly, because the power to regulate Indians is one conferred on the federal government, the Tenth Amendment does not reserve such authority to the States. *City of Roseville,* 219

F.Supp.2d at 154. Thus, plaintiffs' claim of Tenth Amendment violation is without merit. *Id.*

However, the plaintiffs contend that unique circumstances exist concerning the relationship between the state and the Narragansetts and that, in view of such circumstances, the secretary's acceptance of the parcel into trust has, in fact, resulted in an abrogation of the state's sovereignty in contravention of the Tenth Amendment. First, plaintiffs attempt to distinguish the situation presented here by asserting the state consistently has possessed sovereignty over all lands within its borders. For the reasons set forth in the preceding two paragraphs, this argument is devoid of merit.

Second, plaintiffs rely on their assertion that the Settlement Act was intended to preclude any further expansion of the area over which the tribe could exercise sovereignty. As previously discussed, the Settlement Act was limited in scope to a resolution of the Narragansetts' claims of aboriginal right to lands. It did no more. Specifically, the enactment does not restrict the tribe's ability to exercise its sovereignty over lands that it subsequently acquires by purchase. Therefore, plaintiffs' argument to the contrary fails.

III. *Conclusion.*

For the above reasons: (1) the motion of the plaintiffs, Donald L. Carcieri in his capacity as Governor of the State of Rhode Island, the State of Rhode Island, and the Town of Charlestown for entry of

summary judgment is denied; and (2) the motion of the defendants, Gale A. Norton, in her capacity as Secretary of the United States Department of the Interior, and Franklin Keel, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, United States Department of the Interior, United States of America is granted. Judgment shall enter in favor of the defendants.

IT IS SO ORDERED.

United States Court of Appeals
For the First Circuit

No. 03-2647

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS, a sovereign state of the United States of America, and TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs, Appellants,

v.

GALE A NORTON, in her capacity as Secretary of the Department of the Interior, United States of America, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of the Interior, United States of America,

Defendants, Appellees.

Before
Boudin, *Chief Judge*, Torruella, Selya, Lynch, Lipez, and Howard, *Circuit Judges*, and DiClerico, Jr.,* *District Judge*.

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* Of the District of New Hampshire, sitting by designation.

ORDER OF COURT

Entered: September 13, 2005

The appellants filed a petition for en banc rehearing, which we also construe as a petition for panel rehearing. *See* First Circuit Internal Operating Procedure X.

The petition for panel rehearing is granted, and the petition for rehearing en banc is denied without prejudice as moot. A new period for petitioning for en banc review will begin to run following the entry of a new panel opinion and a new judgment. Accordingly, the panel's opinion issued February 9, 2005, is withdrawn, and the judgment entered February 9, 2005 is vacated.

By the Court:

/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

United States Court of Appeals
For the First Circuit

No. 03-2647

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS, a sovereign state of the United States of America, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Plaintiffs, Appellants,

v.

GALE A. NORTON, in her capacity as Secretary of the Department of the Interior, United States of America, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of the Interior, United States of America,

Defendants, Appellees.

Before

Boudin, *Chief Judge*, Torruella, Selya, Lynch, Lipez, and Howard, *Circuit Judges*.

ORDER OF THE COURT
Entered: December 5, 2006

The petition for rehearing en banc is granted. The panel opinion and partial dissenting opinion of this court of September 13, 2005, are withdrawn, and

the judgment of this court of September 13, 2005, is vacated.

The parties are permitted, if they wish to do so, to file simultaneous *supplemental* briefs within 21 days from the date of this order, consisting of not more than 25 pages per side. Fourteen copies of any supplemental brief should be provided, including one copy in WordPerfect format on a computer readable disk. [Amici may also file supplemental briefs by the same deadline, limited to 15 pages.] Copies of briefs previously filed are already available to all of the judges.

This case will be heard on January 9, 2007, at 2:00 p.m., En Banc Courtroom, 7th Floor, John Joseph Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts.

By the Court:
Richard Cushing Donovan, Clerk.

By: /s/ Margaret Carter
Margaret Carter,
Chief Deputy Clerk

Dissent to order follows.

TORRUELLA, *Circuit Judge*, dissenting from the order. I respectfully register my objection to the precipitous manner in which the date for this hearing is set. This matter has been pending before this Court since a motion for en banc review was filed on November 7, 2005, and it is only within this past

week that a vote has been taken to hear the appeal en banc.

Considering the brief time between this order and the appointed hearing date, and given the intervening holiday season, I do not believe the parties are given adequate time for the preparation of supplementary briefs and for amici curiae to enter on appearance.

25 U.S.C.A. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the

name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

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25 U.S.C.A. § 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

L-C
31475-27
12494-27
FGT

May 5, 1927

Mr. John Noka,

Shannock, Rhode Island.

Dear Sir:

Receipt is acknowledged of your letter of April 25, 1927, in which you request the Federal Government to take charge of the affairs of the Narragansett Indians.

The Narragansett Indians are and have been under [the] jurisdiction of different states of New England. The Federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs.

There is, therefore, no possible way in which this Office can furnish you with any assistance, and all communications in regard to your affairs should be taken up with the proper state officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
31295-27
13494-27

Jun. 29, 1927

Mr. Daniel Sekater,
196 High Street,
Westerly, Rhode Island.

My dear Mr. Sekater:

Receipt is acknowledged of your letter of June 22, 1927, in which you request information as to what is to be done in regard to the Narragansett Indians.

The Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of different States of New England.

There is therefore no possible way in which this Office can furnish the Narragansett tribe with any assistance, and all matters in regard to your affairs should be taken up with the proper State officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
14516-37
FGT

Mar. 18, 1937

Hon. John M. O'Connell

House of Representatives

My dear Mr. O'Connell:

Receipt is acknowledged of your letter of March 8, with reference to settlement of the purported claim of the Narragansett Tribe of Indians of Rhode Island.

We have had correspondence directly with Mr. Daniel Sekater relative to this matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe with any assistance.

The situation has not changed since the above mentioned letter was written.

The Narragansett Indians dealt with the Crown of Great Britain through the Colonial Government and their affairs were practically disposed of at the time of the Revolutionary War and before the organization of the Federal Government under the Constitution of the United States. These Indians could, therefore, have no claim against the Federal Government. If they have a claim for two million dollars

it would be against the State of Rhode Island and not the United States of America.

Sincerely yours,

(Signed) [Illegible]

Commissioner

TITLE 25 – INDIANS

CHAPTER 19 – INDIAN LAND CLAIMS SETTLEMENTS

SUBCHAPTER I – RHODE ISLAND INDIAN CLAIMS SETTLEMENT

Part A – General Provisions

§ 1701. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United

States and the legislature of the State of Rhode Island.

§ 1702. Definitions

For the purposes of this subchapter, the term –

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State

of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

§ 1703. Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

§ 1704. Option agreements to purchase private settlement lands

(a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided,* That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Amount of payment

Payment for any option entered into pursuant to subsection (a) of this section shall be in the amount of 5 per centum of the fair market value of the land or

natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

(c) Limitation on option fees

The total amount of the option fees paid pursuant to subsection (b) of this section shall not exceed $175,000.

(d) Application of option fee

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) Retention of option payment

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

§ 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication –

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section. bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy

shall be limited to a right of possession of the settlement lands.

§ 1706. Findings by Secretary

Section 1705 of this title shall not take effect until the Secretary finds –

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that

substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

§ 1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or

the settlement lands: *Provided, however,* That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however,* That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

§ 1708. Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act

(a) In general

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(b) Treatment of settlement lands under Indian Gaming Regulatory Act

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

§ 1709. Preservation of Federal benefits

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669-669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777-777(k)).

§ 1710. Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

§ 1711. Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

§ 1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b) of this section –

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

Part B. Tax Treatment

§ 1715. Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form

of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

§ 1716. Deferral of capital gains

For purposes of Title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as in involuntary conversion within the meaning of section 1033 of Title 26.

[SEAL] United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Area Office
Suite 260
3701 North Fairfax Drive
Arlington, Virginia 22203

IN REPLY REFER TO: MAR 6 1998

Trust Services
Branch of Realty

Honorable Matthew Thomas
Chief Sachem, Narragansett Indian Tribe
P.O. Box 268
Charlestown, Rhode Island 02813

Dear Mr. Thomas:

This letter is to inform you of the intent of the Secretary of the Interior to accept the property known as Assessor's Plat 117, Lot 119 of Charlestown, Rhode Island into trust for the use and benefit of the Narragansett Tribe of Indians of Rhode Island.

After consideration of the requirements under the provisions of 25 Code of Federal Regulations, (CFR), Part 151, Land Acquisitions, Sub-sections .10 and .11, and new procedures as established under Final Rule, 25 Code of Federal Regulations, Part 151.12 (61 FR 18082-83), it has been determined to be in the best interest of the Tribe that the subject property be accepted into trust.

This letter will also serve as a letter of notification to the following interested parties:

1. Governor Lincoln Almond
   State of Rhode Island and Providence Plantations
   State House
   Providence, Rhode Island 02908-1196

2. Mr. George Hibbard, Town Administer
   Charlestown Town Hall
   4540 South County Trail
   Charlestown, Rhode Island 02813

3. Mr. Ken Swain, Town Assessor
   Charlestown Town Hall
   4540 South County Trail
   Charlestown, Rhode Island 02813

The property is adjacent to the Tribe's current trust lands and was acquired for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD).

The application was reviewed pursuant to the regulations cited at 25 CFR 151.10 (copy enclosed)

This decision may be appealed to the Interior Board of Indian Appeals (IBIA) within thirty (30) days of receipt of this letter and an Appellant is required to file an opening brief within thirty (30) days after receipt of the IBIA's Notice of Docketing pursuant to regulations cited in 43 Code of Federal Regulations, Part 4.

The IBIA is located at the following address:

U. S. Department of the Interior
Interior Board of Indian Appeals
Office of Hearing and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

If you have any questions regarding this matter, please contact Mr. Bill Wakole, Area Realty Officer at (703) 235-2726.

Sincerely,

/s/ Franklin Keel
Franklin Keel
Eastern Area Director

Enclosure

OPPOSITION BRIEF

FILED
JAN 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-526

In the Supreme Court of the United States

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RONALD L. TENPAS
Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Narragansett Tribe is eligible to receive benefits pursuant to Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, although the Tribe was not "federally recognized" on the date of the IRA's enactment.

2. Whether the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*, foreclosed the Narragansett Tribe's right to exercise sovereignty over any land located in Rhode Island.

3. Whether Section 5 of the IRA constitutes an unconstitutional delegation of legislative authority to the Secretary of the Interior.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 23

TABLE OF AUTHORITIES

Cases:

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 22
Cass County v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) 19
Central Mach. Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980) 20
Chevron U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) 5
City of Sherrill v. *Oneida Indian Nation*, 544 U.S. 197 (2005) 17, 19, 21
Confederated Tribes of Siletz Indians v. *United States*, 110 F.3d 688 (9th Cir.), cert. denied, 522 U.S. 1027 (1997) 18
County of Yakima v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) 19
Difford v. *Secretary of HHS*, 910 F.2d 1316 (6th Cir. 1990) 7
FPC v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) ... 13
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 22

Cases—Continued: Page

Kahawaiolaa v. *Norton*, 386 F.3d 1271 (9th Cir. 2004) 11
Lichter v. *United States*, 334 U.S. 742 (1948) 22
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 19, 22
Montana v. *Kennedy*, 366 U.S. 308 (1961) 7
Morton v. *Mancari*, 417 U.S. 535 (1974) 13
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 9
Native Village of Eyak v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090 (9th Cir. 1998) 15
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 22
Shivwits Band of Paiute Indians v. *Utah*, 428 F.3d 966 (10th Cir. 2005), cert. denied, 127 S. Ct. 38 (2006) 18, 22
South Dakota v. *Department of the Interior*, 423 F.3d 790 (8th Cir. 2005), cert. denied, 127 S. Ct. 67 (2006) 18, 22
United States v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) 20
United States v. *Dann*, 873 F.2d 1189 (9th Cir. 1989) ... 16
United States v. *Hitchcock*, 205 U.S. 80 (1907) 20
United States v. *Jackson*, 280 U.S. 183 (1930) 20
United States v. *John*:
437 U.S. 634 (1978) 8, 9
560 F.2d 1202 (5th Cir. 1977), rev'd, 437 U.S. 634 (1978) 10
United States v. *Mazurie*, 419 U.S. 544 (1975) 20

Cases—Continued: Page

United States v. *Mitchell*, 463 U.S. 206 (1983) 20
United States v. *Roberts*, 185 F.3d 1125 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000) 18
United States v. *State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) 10
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 14
Western Mohegan Tribe v. *Orange County*, 395 F.3d 18 (2d Cir. 2004) 15, 16
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 18, 20, 22
Zedner v. *United States*, 126 S. Ct. 1976 (2006) 22

Constitution, statutes and regulations:

U.S. Const. Amend XI 1
Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* .. 19
Indian Reorganization Act, 25 U.S.C. 461 *et seq.* 1
25 U.S.C. 462 16
25 U.S.C. 465 (§ 5) ..... *passim*
25 U.S.C. 476(f) 17
25 U.S.C. 479 (§ 19) 6, 8, 10
Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101, 102 Stat. 2938 19
Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207 19
Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709 19
Maine Indian Claims Settlement Act of 1980, 25 U.S.C. 1724(e) (Supp. V 2005) 14

Statutes and regulations—Continued: Page

Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. 1754(b)(8) 14
Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.* 2
25 U.S.C. 1705(a)(3) 12
25 U.S.C. 1707(c) 3, 7, 12
25 U.S.C. 1708(a) 3, 12, 13
Trade and Intercourse Act of 1834, 25 U.S.C. 177 2
18 U.S.C. 1151 16
25 C.F.R. Pt. 151 ..... 2, 9, 10
Section 151.2(b) 9
Section 151.10(e) 21
Section 151.10(f) 21
Section 151.10(g) 21

Miscellaneous:

Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983) 3, 13
GAO, *GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process* (Nov. 2001) 7
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934) 22

In the Supreme Court of the United States

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DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-81) is reported at 497 F. 3d 15. The memorandum and order of the district court (Pet. App. 84-136) are reported at 290 F. Supp. 2d 167.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized the Secretary of the

Interior (Secretary) to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The Department of the Interior exercises this authority in accordance with regulations found at 25 C.F.R. Part 151. In 1998, the Secretary approved the Narragansett Indian Tribe's application to have a 31-acre parcel of land owned in fee by the Tribe and located in Charlestown, Rhode Island, taken into trust for the Tribe's benefit pursuant to the IRA. The parcel is adjacent to the Tribe's pre-existing trust lands and was acquired by the Tribe to be used for low-income Indian housing. Pet. App. 162-164.

The State of Rhode Island, its governor, and the Town of Charlestown (petitioners) filed suit claiming, *inter alia*, that the Tribe is not eligible to receive benefits under the IRA; that Section 5 of the IRA, 25 U.S.C. 465, is unconstitutional; and that the Secretary's decision was arbitrary and capricious and contrary to the Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq.* The district court rejected all of petitioners' challenges. Pet. App. 84-136. The court of appeals, sitting en banc, affirmed. Pet. App. 1-81.

1. The Narragansett Indians were the aboriginal inhabitants of what is now Rhode Island. In 1975, the Narragansetts, then organized as a state-chartered corporation, filed suit against the State and private landowners, pursuant to the Trade and Intercourse Act of 1834, 25 U.S.C. 177, to recover 3200 acres of their aboriginal territory. Pet. App. 10-11, 86. After lengthy multilateral negotiations, the parties settled the land claims in 1978, pursuant to an agreement that was ratified by

Congress and implemented, *inter alia*, through the Settlement Act. The settlement conferred 1800 acres of land (the Settlement Lands) on the Narragansetts and expressly made those lands subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. 25 U.S.C. 1708(a); Pet. App. 11. In exchange, the Narragansetts agreed to the extinguishment of their aboriginal land claims throughout the State. *Ibid.* The Settlement Act specifically anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," by preventing those lands from being alienated without the Secretary's approval after any such acknowledgment. 25 U.S.C. 1707(c).

In 1983, the Secretary formally acknowledged the Narragansett Indian Tribe as a federally recognized Tribe under regulations promulgated by the Department of the Interior. *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177 (1983). Following that formal acknowledgment, the Tribe applied to have the Settlement Lands taken into trust pursuant to the Part 151 regulations implementing Section 5 of the IRA. In 1988, the Secretary accepted the Settlement Lands in trust, subject to the provision of the Settlement Act (25 U.S.C. 1708(a)) requiring that the Settlement Lands remain subject to state civil and criminal law and jurisdiction. Pet. App. 11-12, 87.

2. In 1992, the Tribe acquired the 31-acre parcel that is the subject of this litigation. Pet. App. 4, 12. That parcel is "adjacent to the [S]ettlement [L]ands, across a town road." *Id.* at 13. The Tribe applied to the Secretary in 1993, requesting acquisition of this parcel in trust, and submitted a revised application in 1997. *Id.*

at 14. On March 6, 1998, following a lengthy administrative process, the Department announced the decision of the Area Director to approve the Tribe's application for trust acquisition of the 31 acres "for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the [U.S.] Department of Housing and Urban Development." *Id.* at 162-163.

Petitioners sought review by the Interior Board of Indian Appeals (IBIA). Pet. App. 14. On June 29, 2000, after full briefing of the issues, the IBIA issued a decision affirming the trust acquisition decision and denying petitioners' appeals. *Id.* at 15.

3. Petitioners then initiated this suit in the United States District Court for the District of Rhode Island against the Secretary of the Interior and the Director of the Eastern Regional Office of the Bureau of Indian Affairs. In the district court, petitioners sought to invalidate the decision to acquire the land in trust on multiple grounds, including the following: that the Secretary's decision did not comply with the applicable law and should be reversed under the Administrative Procedure Act; that the Settlement Act precludes the Tribe from acquiring lands in Rhode Island that are exempt from the State's civil and criminal law and jurisdiction; that the IRA does not apply to the Narragansett Indian Tribe; and that Section 5 of the IRA is unconstitutional. On cross-motions for summary judgment, the district court rejected each of petitioners' claims and affirmed the Secretary's decision. Pet. App. 101-136.

4. A divided panel of the court of appeals affirmed, but the en banc court withdrew that opinion and granted rehearing. Pet. App. 15. Sitting en banc, the court of appeals unanimously affirmed the decision to accept the

land in trust. Pet. App. 1-81. The court of appeals rejected petitioners' various arguments that the relevant provision of the IRA is unconstitutional. *Id.* at 50-59. It further held that Interior's interpretation of that provision, under which the Tribe is entitled to benefit from the Secretary's authority to acquire land in trust, was reasonable and entitled to deference under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 17-37. And it held that the decision to accept the application to acquire the land in trust was not arbitrary, capricious, or contrary to law. *Id.* at 59-71.

The majority of the court of appeals also concluded that the Settlement Act's provision applying state civil and criminal law and jurisdiction on the Settlement Lands is limited on its face to the Settlement Lands and cannot reasonably be interpreted to extend to other lands in Rhode Island. Pet. App. 37-50. Judge Howard and Judge Selya dissented as to the jurisdictional status of the lands once they were taken in trust. *Id.* at 71-81. Those two judges would have held that the Settlement Act prohibits "unrestricted" trust acquisition, because in their view the Settlement Act requires that any Indian trust land in Rhode Island remain subject to the State's civil and criminal laws and jurisdiction. *Id.* at 72 & n.25 (Howard, J., dissenting); *id.* at 79 (Selya, J., dissenting).

ARGUMENT

On each of the three questions presented by petitioners, the court of appeals' decision is consistent with this Court's precedents and does not conflict with the decision of any other circuit. Accordingly, further review by this Court is unwarranted.

1. Petitioners first argue that the IRA does not apply to the Narragansett Tribe because they contend that the definition of "Indian" in Section 19 of the IRA, 25 U.S.C. 479, applies only to Tribes that were "both federally recognized and under federal jurisdiction" on the effective date of the IRA in 1934, while the Narragansetts were not recognized until 1983. Pet. 14. The court of appeals, however, correctly concluded that the Interior Department, which is charged with administering the IRA, has reasonably interpreted the statute's ambiguous terms, and that the IRA's authorization to acquire land for "Indians" allows the Secretary to act for the benefit of any recognized Tribe and its members, and not solely for the subset of Tribes that were already "recognized" by the Secretary on June 18, 1934. Nor does that decision conflict, as petitioners claim, with decisions of this Court or other courts of appeals.

a. The relevant provision, Section 19 of the IRA, defines "Indian" for purposes of the IRA as including

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. 479. The principal question is how to construe the phrase "any recognized Indian tribe now under Federal jurisdiction."

The court of appeals' opinion—which was unanimous on this point—amply demonstrates that the time meant by "now" is ambiguous. Pet. App. 19-28. Congress

sometimes uses the word to refer to the time a provision was enacted, and sometimes to a later time at which a provision will be applied. Compare *Montana* v. *Kennedy*, 366 U.S. 308, 312 (1961) (time of enactment), with *Difford* v. *Secretary of HHS*, 910 F.2d 1316, 1320 (6th Cir. 1990) (time of disability benefits hearing). Statutory context within the IRA does not clarify the matter, especially since the next clause of the same definition refers to a specific date, seventeen days before the statute's effective date, demonstrating that Congress knew how to fix a date.[1] Pet. App. 20-21. The court of appeals also analyzed policy considerations, *id.* at 21-22, and the IRA's legislative history, *id.* at 23-28.

Having established that the statute is ambiguous, the court of appeals then correctly concluded that the Secretary's interpretation is reasonable, consistent with the

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[1] Moreover, as discussed below (at p. 14, *infra*), settlement acts pertaining to certain Tribes in Maine and to the Mashantucket Pequot Indian Tribe in Connecticut preclude or limit the application of Section 5 of the IRA. Insofar as Section 5 is concerned, that preclusion would be unnecessary under petitioners' reading of the IRA, because they claim that it is inapplicable to Tribes recognized after 1934, and those Tribes were not recognized until long after that date. See GAO, *GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process* 25-26 (Nov. 2001) (noting that the Tribes in Maine were recognized by the Department of the Interior in 1972, and the Mashantucket Pequot Tribe was recognized by Congress itself in 1983). In that statutory context, it is noteworthy that the Settlement Act—enacted in 1978 and reflecting not only Congress's views but also the agreement of parties including the State of Rhode Island and the Town of Charlestown—specifically contemplated that the Secretary might "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians." 25 U.S.C. 1707(c).

text, legislative history, and policy of the IRA, and thus entitled to *Chevron* deference. Pet. App. 29.[2]

b. Petitioners erroneously assert (Pet. 14-16, 18) that the meaning of the term "now" in Section 19 is controlled by the "sustained precedential value" of this Court's decision in *United States* v. *John*, 437 U.S. 634 (1978). The source of that alleged value is the fact that the Court described the definition of "Indians" in the IRA as including "not only * * * 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' * * * but also * * * 'all other persons of one-half or more Indian blood.'" *Id.* at 650 (bracketed alteration in original) (quoting 25 U.S.C. 479). Thus, petitioners' argument hinges solely on the Court's insertion of "[in 1934]" in its quotation of the statute.

As the court of appeals noted, however, the Court's passing editorial emendation "contains no analysis on this point" and, more importantly, was entirely unnecessary to its holding. Pet. App. 22-23. Recounting a series of congressional and executive actions, the Court thoroughly rejected the Fifth Circuit's conclusion that the federal government had been precluded from holding lands in trust for the benefit of the Mississippi Choctaws. *John*, 437 U.S. at 649-650. When it reached the point of "[a]ssuming for the moment that authority for the [relevant] proclamation can be found only in the [IRA]," the Court—like the briefs of the parties[3]—ad-

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[2] The court of appeals also rejected petitioners' claims that the Secretary's interpretation of the definition of "Indians" had varied over time. Pet. App. 30-37. The petition does not renew that argument.

[3] See U.S. Br. at 27, *United States* v. *John*, 437 U.S. 634 (1978) (No. 77-836) ("The term 'Indian' is then defined by Section 19, 25 U.S.C. 479, to include, among others, 'all other persons of one-half or more Indian

dressed whether Mississippi Choctaws were "persons of one-half or more Indian Blood," and, finding that they were, held that "the Mississippi Choctaws were not to be excepted from the general operation of the [IRA]." *Id.* at 650.

Moreover, regardless of what *John*'s editorial insertion meant at the time, petitioners overlook the critical fact that the Court's decision predates the Secretary's 1980 adoption, by notice-and-comment rulemaking, of the regulations in 25 C.F.R. Part 151, which govern trust acquisitions under Section 5 of the IRA and reject petitioners' reading. See 25 C.F.R. 151.2(b) (defining a Tribe as one "recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"); see also Pet. App. 31 ("The regulation does not distinguish between tribes recognized before June 18, 1934 and those recognized thereafter.").

As this Court held in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), a "judicial precedent" does not "foreclose an agency from interpreting an ambiguous statute" in a reasonable way that differs from the "court's opinion as to the best reading" of the statute, unless "the prior court decision *holds* that its construction follows from the *unambiguous terms of the statute* and thus leaves no room for agency discretion." *Id.* at 982-983 (emphases added). However much petitioners may seek to read into the insertion of the phrase "[in 1934]" in *John*'s quo-

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blood.'"); John Br. at 29, *John*, *supra* (Nos. 77-575 and 77-836); see also Miss. Band of Choctaw Indians Amicus Br. at 7, 17, *John*, *supra* (Nos. 77-575 and 77-836). In the case consolidated with *United States* v. *John*, the State of Mississippi simply asserted that "neither the 1934 Indian Reorganization Act nor the 1939 Act established Indian Country in Mississippi." Miss. Mot. to Dismiss at 8, *John*, *supra* (No. 77-575).

tation of Section 19, they certainly cannot establish that the glancing reference was a "hold[ing] that [the Court's] construction follows from the unambiguous terms of the statute." Accordingly, the decision in *John* cannot control the outcome in this case, and the court of appeals appropriately engaged in *Chevron* analysis in the wake of the 1980 rulemaking.

c. Petitioners also argue (Pet. 16-17) that the decision below conflicts with two decisions of other courts of appeals. There is, however, no square conflict with either decision.

The Fifth Circuit's decision in *United States* v. *State Tax Commission*, 505 F.2d 633 (1974), was superseded by this Court's decision in *John*, which reversed the Fifth Circuit's conclusion that a Mississippi Choctow Reservation was not Indian country.[4] Of course, even assuming, as petitioners suggest, that one strand of *State Tax Commission*'s reasoning maintains some force because this Court's decision in *John* did not affirmatively "express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in [*State Tax Commission*]," Pet. 18, the Fifth Circuit's 1974 analysis still cannot dictate the construction of Section 19 under *Brand X*, because it predates the rulemaking that adopted the Part 151 regulations. See p. 9, *supra*.

Petitioners also exaggerate (Pet. 16-17) the significance of the Ninth Circuit's decision in *Kahawaiolaa* v.

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[4] As the Fifth Circuit later recognized, even though the United States believed that the Fifth Circuit's decision in *State Tax Commission* "incorrectly concluded that the Mississippi Choctaws are not a tribe," it did not seek certiorari in this Court because this conclusion "was unnecessary to the [Fifth Circuit's] resolution of the [case]." *United States* v. *John*, 560 F.2d 1202, 1205 (1977), rev'd, 437 U.S. 634 (1978).

Norton, 386 F.3d 1271 (2004), which involved an equal protection challenge to the exclusion of Native Hawaiians from the coverage of the Interior Department's regulations governing the acknowledgment of the recognized status of Indian Tribes. Petitioners seize (Pet. 17) on the Ninth Circuit's passing observation in that case after quoting Section 5 of the IRA that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Kahawaiolaa*, 386 F.3d at 1280. But the court in *Kahawaiolaa* was concerned only with the exclusion of Native Hawaiians from the IRA, and only for the purpose of assessing the Secretary's regulations that excluded them. The decision did not address the application of the IRA to non-Hawaiian groups; indeed, the Ninth Circuit expressly stated that it was not concerned with any legal distinctions among Indian groups in the continental United States:

> We do not think that the difference between the two groups [recognized and non-recognized] of native Americans domiciled in the continental United States is of legal significance for purposes of our opinion. The critical factor is the similarity of the geographic and historical circumstances of indigenous native American groups, federally recognized as Indian tribes or not, and the contrast between those circumstances and the geographic and historic circumstances of native Hawaiians as a whole.

Id. at 1281 n.5. In short, *Kahawaiolaa* had no occasion to answer the question whether the IRA applies to persons who are not members of Tribes recognized in 1934, and petitioners have identified no other authority that postdates the 1980 rulemaking and even purportedly

conflicts with the court of appeals' decision that the Secretary's interpretation of the IRA is reasonable and entitled to deference.

2. Petitioners next urge (Pet. 21-35) this Court to grant certiorari to consider whether the extinguishment of aboriginal land claims in the Settlement Act also implicitly foreclosed all future trust acquisitions for the Narragansett Tribe. The Settlement Act was enacted to implement a multilateral settlement of land-claims litigation, and it closely tracked the provisions of the joint memorandum of understanding that memorialized that specific settlement among those specific parties. As discussed above, the Settlement Act granted the Settlement Lands to the Narragansetts in exchange, *inter alia*, for the extinguishment of their aboriginal-title claims throughout the State.[5] The Settlement Act further provided that state civil and criminal law would apply on the Settlement Lands, 25 U.S.C. 1708(a), and that, in the event that the Narragansetts were acknowledged as a Tribe, those lands could not be alien-

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[5] The Settlement Act provides in part as follows:

> [B]y virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. 1705(a)(3).

ated without the approval of the Secretary, 25 U.S.C. 1707(c). Following the Tribe's formal acknowledgment as a federally recognized Tribe on February 10, 1983 (48 Fed. Reg. at 6177), the State transferred the Settlement Lands to the Tribe, subject to the Settlement Act's explicit provision that state civil and criminal jurisdiction would apply on those lands.

a. Petitioners contend (Pet. 26-32) that, by extinguishing aboriginal title, Congress effectively extended the provision in Section 1708(a) of the Settlement Act to all lands in Rhode Island, thereby implicitly limiting the authority of the Secretary as set forth in the IRA. The cornerstone of petitioners' theory is the proposition that "aboriginal title encompasses more than just a fee simple interest; it includes a sovereignty interest as well." Pet. 27. According to petitioners, it follows from this conception of aboriginal title that by extinguishing aboriginal title, Congress foreclosed the Tribe's exercise of "territorial sovereignty, including the sovereignty interest arising from trust." *Ibid.*

Petitioners' contention is irrelevant to the issue at hand, which is whether Congress in enacting the Settlement Act implicitly limited the authority of the Secretary to take land into trust for the Tribe pursuant to the IRA. Such implicit repeals are disfavored. See *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). Moreover, in the context of limitations on governmental authority, this Court presumes that statutes do not limit prior governmental authority unless Congress states so expressly. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without

express words to that effect.") (quoting *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947)).

Furthermore, there is even less reason to infer a repeal in this context, because Congress has demonstrated in other settlement acts that it knows how to expressly preclude future acquisition of trust land in a settlement act, as demonstrated by statutes enacted to effectuate agreements involving other Tribes and States. For example, as the court of appeals observed (Pet. App. 47-48), the Maine Indian Claims Settlement Act of 1980 includes a provision that precludes application of Section 5, 25 U.S.C. 1724(e), and the Mashantucket Pequot Indian Claims Settlement Act precludes the application of Section 5 to certain non-settlement lands, 25 U.S.C. 1754(b)(8).

b. Even assuming that petitioners' assumptions about aboriginal title are relevant to the implied-repeal analysis, petitioners err in contending (Pet. 27) that the First Circuit's decision conflicts with decisions of the Second and Ninth Circuits.[6]

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[6] Petitioners' amici claim (at 16) that the First Circuit's decision deepens a *different* purported circuit split, about "whether, and how, the Indian canon and other rules of construction should apply to modern settlement acts." It is, however, difficult to see how the First Circuit could have taken the position that amici attribute to it. The majority's discussion of the Settlement Act never invoked a presumption in favor of Indians, but rather made repeated references to the text of the Settlement Act and a straightforward application of the presumption against implied repeals. Pet. App. 37, 38, 39-40, 44, 46-47, 49. Moreover, Judge Howard's dissent cited First Circuit precedent for the proposition that "the generous rules of 'Indian construction' do not apply in analyzing an implied repeal," *id.* at 72, and, though he disagreed with the majority's construction of the statute, he did not claim it had departed from that precedent.

Petitioners assert (Pet. 27-28) that in *Native Village of Eyak* v. *Trawler Diane Marie, Inc.*, 154 F.3d 1090 (1998), the Ninth Circuit "determined that aboriginal title includes a claim of sovereignty over land." In that case, five Native Villages claimed to hold *unextinguished* aboriginal title to a portion of the outer continental shelf of the United States, which, they asserted, entitled them to "*exclusive* use of the ocean resources and regulatory power over third parties." *Id.* at 1096. The Villages argued that their claims, unlike those of States, were not barred by the "federal paramountcy doctrine," because aboriginal title is not a legal or fee title but is instead a "right to use and occupy territory" that is admittedly owned by the federal government. *Id.* at 1094-1095. The Ninth Circuit rejected their arguments because it found no "practical difference between" the Villages' claim to "*exclusive* rights to use or occupy areas of the ocean" and state claims of fee title that had previously been rejected under the paramountcy doctrine. *Id.* at 1095-1096. Thus, that court had no occasion to consider whether the extinguishment of aboriginal title would diminish a Tribe's "sovereignty" or its subsequent ability to assert rights in later-acquired trust lands. Petitioners' attempt to predict what the Ninth Circuit "would" do when presented with facts such as these in this case (Pet. 28) does not give rise to a conflict.

Similarly, notwithstanding petitioners' claims to the contrary (Pet. 28-29), the Second Circuit's decision in *Western Mohegan Tribe* v. *Orange County*, 395 F.3d 18 (2004), does not conflict with the decision in this case. In *Western Mohegan Tribe*, the court held that a suit attempting to assert the rights to exclusive use attendant upon unextinguished aboriginal title was the functional

equivalent of a challenge to New York State's exercise of fee title and was thus barred by New York's immunity under the Eleventh Amendment. It also made clear that aboriginal title is the "Indians' right of occupancy and use" of land, but is still subject to extinguishment by the sovereign (now the federal government). *Id.* at 22-23. It did not, however, have any occasion to address the consequences of extinguishing Indian title or the application of statutory mechanisms for establishing or restoring tribal sovereignty over land.

c. Petitioners incorrectly assert (Pet. 30) that the definition of "Indian country" in 18 U.S.C. 1151 acknowledges their theory that aboriginal title consists of both property interests and aspects of sovereignty by including "allotments the Indian titles to which have not been extinguished." According to petitioners (Pet. 30), that language embodies Congress's understanding that fee title held by Indian allottees is "transform[ed]" into Indian country by the "persistence of aboriginal title." In fact, even though aboriginal title is sometimes called "Indian title," the common view of aboriginal title is that it is held by Tribes. See *United States* v. *Dann*, 873 F.2d 1189, 1195 (9th Cir. 1989). The reference to "Indian title[]" in 18 U.S.C. 1151, by contrast, is to the beneficial interest of an individual Indian in trust or restricted-fee lands. The United States indefinitely retained trust title to Indian allotments that remained in individual Indian ownership in 1934, pursuant to the IRA. 25 U.S.C. 462. Those lands therefore were never conveyed to the Indian allottees in fee simple. Such trust allotments, like tribal reservation and dependent Indian community land, are "Indian country" under Section 1151, regardless of the "persistence of aboriginal title."

d. Petitioners also err in suggesting that their case is bolstered by *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005). In *City of Sherrill*, this Court considered circumstances where a Tribe claimed that its purchase of lands within its reservation boundary had reestablished "Indian country." While the Court rejected the unilateral assertion of "Indian country" status under the circumstances of that case, it specifically noted that Section 5 of the IRA provided a way for the Oneida Indian Nation to secure relief. After describing the trust-acquisition power under Section 5 and the "regulations implementing" it, the Court concluded that "Section [5] provides the proper avenue for [the Oneida Indian Nation] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 220-221. Thus, *City of Sherrill* clearly endorses a Tribe's ability to use Section 5 to reestablish "sovereign control over territory" (*i.e.*, restore sovereign control after it has lapsed). *Ibid.* It does not, however, provide any support for petitioners' claim (Pet. 31) that the Narragansetts are implicitly barred from invoking Section 5 simply because their aboriginal title was extinguished by the Settlement Act.

This case merely presents an instance in which a recognized Tribe has availed itself of the statutory mechanism that was endorsed by this Court in *City of Sherrill*. And, because all recognized Tribes are equally entitled to the benefits of the federal programs established by the IRA, 25 U.S.C. 476(f), congressional extinguishment of the Narragansetts' aboriginal title is irrelevant to the Tribe's right to avail itself of the benefits of trust acquisition pursuant to Section 5.

e. Finally, as is obvious from the foregoing, the question about construing the Settlement Act is not one

of general national significance, but, as Judge Howard wrote in dissent, "a very narrow question" involving the "specific context" of the Narragansetts and the State of Rhode Island. Pet. App. 72. Although other Tribes and other States have their own settlement acts, the express language of those acts often differs on the very point at issue here. *Id.* at 47-48. Thus, contrary to the suggestion of petitioners' amici (at 18), this case would not provide a good vehicle for this Court to "clarify how settlement acts nationwide should be construed."

3. With respect to their third question, petitioners argue (Pet. 35-39) that this Court should grant certiorari to consider whether Section 5 of the IRA, 25 U.S.C. 465, is an unconstitutional delegation of the legislative power of Congress.

a. Petitioners do not, and could not, suggest that there is any conflict on this question. Each of the courts of appeals that has considered a constitutional challenge to Section 5 on nondelegation grounds—whether before or after this Court's decision in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001)—has upheld the statute's constitutionality. See Pet. App. 54-59; *South Dakota* v. *Department of the Interior*, 423 F.3d 790 (8th Cir. 2005), cert. denied, 127 S. Ct. 67 (2006); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), cert. denied, 127 S. Ct. 38 (2006); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).

b. Nor is this issue one of urgent importance warranting the Court's review despite the unanimity of the courts of appeals in sustaining Section 5. The statutory

provision that petitioners seek to have invalidated was enacted more than 70 years ago, and since that time it has become embedded in the practical, day-to-day administration of Indian affairs. For seven decades, Section 5 of the IRA has provided the primary mechanism for the federal government to restore and replace tribal lands. Congress has, moreover, often revisited and amended the IRA, even after the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that are to guide his determinations.[7]

Similarly, this Court has considered Section 5 on numerous occasions and has remarked, as noted above, that, along with its implementing regulations, it "provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill*, 544 U.S. at 220-221; see also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 5, Congress granted the Secretary "authority to place land in trust, to be held by the Federal Government for the benefit of the Indians," and "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt"); *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-159 (1973).

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[7] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465 to all Tribes).

At root, petitioners' argument represents a disagreement with longstanding principles embodied in the IRA and numerous other statutes that govern Indian lands and Indian self-determination. Against that background, Congress made an explicit policy determination in Section 5 of the IRA to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465.

c. Petitioners' contention (Pet. 37) that the acquisition of lands in trust status by the Secretary "precludes the state from exercising fundamental attributes of its sovereignty" provides no basis for granting certiorari. Although petitioners correctly note that the Court stated in *Whitman* that the level of direction required of Congress will vary depending upon the nature of the power conferred, Pet. 36-37 (citing *Whitman*, 531 U.S. at 475), that principle *supports* the constitutionality of the authority conferred by Section 5. In an area in which the Executive has historically exercised expansive authority,[8] such as the supervision of lands occupied by Indians, broader authorizations are especially appropriate. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing that Congress may accord to the President a greater degree of discretion in the area of foreign affairs than would be acceptable if only domestic affairs were involved); *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (upholding a broad conferral of authority on various Indian Tribes to regulate the introduction of liquor into Indian country

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[8] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

on the ground that limitations on Congress's authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter").

Moreover, petitioners ignore the fact that the regulations promulgated by the Secretary to implement the purposes of Section 5 address the very concerns they raise about intrusions into state sovereignty. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section 5] are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the Bureau of Indian Affairs, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when, as was true in this case, the land to be acquired is held in unrestricted fee status, the BIA must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g). The court of appeals concluded that the BIA properly applied those regulations in this case, Pet. App. 61-71, and petitioners do not challenge that ruling here.

d. Finally, petitioners are incorrect in their claim (Pet. 38) that "*Whitman* prohibits" the use of legislative history in determining whether the Executive is subject to an "intelligible principle." Like other courts of appeals presented with this argument, the First Circuit correctly looked to "the purposes evident in the whole of the IRA and its legislative history" to establish that the

Secretary's discretion is subject to guidance from an intelligible principle. Pet. App. 57 (quoting *South Dakota*, 423 F.3d at 797); see also *Shivwits Band of Paiute Indians*, 428 F.3d at 973 (observing that the claim that any "'intelligible principle' must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*"). *Whitman*'s reiteration of the requirement that Congress "lay down by legislative act an intelligible principle" did not address in any way what reliance a court may give to legislative history in construing the text that Congress has enacted. *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). This Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute establishes an intelligible principle. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946); *Lichter* v. *United States*, 334 U.S. 742, 778-779 (1948). To the same extent that legislative history may be useful to confirm the meaning of arguably ambiguous text in other contexts, see, *e.g.*, *Zedner* v. *United States*, 126 S. Ct. 1976, 1985-1986 (2006), so may it also serve that function in resolving a constitutional challenge on nondelegation grounds. And of particular relevance here, this Court has relied on the legislative history of the IRA in identifying its purposes and policies. See, *e.g.*, *Mescalero Apache Tribe*, 411 U.S. at 152-154 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); *New Mexico* v.

Mescalero Apache Tribe, 462 U.S. 324, 335 n.17 (1983) (quoting same).

Accordingly, the court of appeals committed no methodological mistake (and certainly created no conflict) by taking legislative history into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD L. TENPAS
Acting Assistant Attorney General

WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorney

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REPLY BRIEF

83

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In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

Governor Donald L. Carcieri
By His Attorney,

CLAIRE RICHARDS*
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

State of Rhode Island
By Its Attorney,

PATRICK C. LYNCH
Attorney General

NEIL F.X. KELLY*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor
for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. "Now" Does Not Mean "Later" 2

II. The Circuit Split Over Aboriginal Title Affects Numerous Settlement Acts and Must be Addressed 6

III. Section 465 of the IRA Violates the Non-Delegation Doctrine 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Brown v. Gardner, 513 U.S. 115 (1994) 5

Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004) 4

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 3

Montana v. Kennedy, 366 U.S. 308 (1961) 2

National Cable & Telecom. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 3, 4

Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998) 6

Northern Mariana Islands v. United States, 399 F.3d 1057 (9th Cir. 2005) 7

Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) 7, 9, 10

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 3

United States v. John, 437 U.S. 634 (1978) 3

United States v. Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) 3

Western Mohegan Tribe v. Orange County, 395 F.3d 18 (2nd Cir. 2004) 7

Whitman v. American Trucking Assn., 531 U.S. 457 (2001) 11, 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

25 U.S.C. § 465 ..... *passim*

25 U.S.C. § 479 ..... *passim*

25 U.S.C. § 1705(a) 9

25 U.S.C. § 1708(a) 9

25 U.S.C. § 1712(a) 9

25 U.S.C. § 1724(d) 9

25 U.S.C. § 1724(e) 9

25 U.S.C. § 1754(b)(7) 9

25 U.S.C. § 1754(b)(8) 8

43 U.S.C. § 1601 *et seq.* 10

43 U.S.C. § 1603(b) 10

REGULATIONS

25 C.F.R. 151.2 5

OTHER AUTHORITIES

Cohen's Handbook of Federal Indian Law (N.J. Newton *et al.*, eds. 2005) 7

REPLY BRIEF

Two acts of Congress and a constitutional doctrine preclude the Secretary from taking land into trust in Rhode Island for the Narragansett Indian Tribe. First, the Indian Reorganization Act (IRA) – enacted in 1934 – only authorizes land to be taken into trust for "any recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). As every court to have construed the provision has concluded – until the First Circuit's opinion below – "now" means "now," not "later" or "now or hereafter." This Court's opinions and the other provisions of the IRA make that clear. The IRA does not authorize land to be taken into trust for an Indian tribe, like the Narragansetts, that was neither federally recognized nor under federal jurisdiction until decades after the IRA's passage.

Second, the Rhode Island Settlement Act expressly extinguished the Narragansett's aboriginal title. By taking land into trust for the Tribe, however, the Secretary would return to the Tribe a significant aspect of aboriginal title – sovereign authority over land. A clearer violation of the Settlement Act is hard to imagine. Finally, the Secretary's trust authority comes from a statute that provides no guidance whatsoever to limit his discretion. The IRA therefore violates the non-delegation doctrine. In disregarding these three barriers to trust, the First Circuit incorrectly decided three issues of nationwide importance – and, as to the first two issues, in conflict with other federal courts of appeals.

Sixteen states from Alaska to Florida filed an amicus brief supporting this petition for certiorari, attesting to its far-reaching importance. While Indian tribes and organizations have declined to participate at the certiorari stage (no doubt in a strategic attempt to downplay the importance of this case), the National Congress of American Indians, over sixty Indian tribes, and other Indian organizations participated in briefing and argument below. Tribes across the country, like the states, believe that the issues presented by this petition are of national significance. This Court's review is warranted.

I. "Now" Does Not Mean "Later"

The Secretary, like the court below, claims that the word "now," as used in Section 479 of the 1934 Act, is ambiguous; it could mean at "the time a provision was enacted" or "a later time at which a provision is applied." Opp.7. The Secretary cannot cite any opinion of this Court interpreting the word "now" in a statute to mean "later." On the contrary, in *Montana v. Kennedy*, 366 U.S. 308, 311 (1961), this Court held that the plain meaning of the word "now" is to temporally limit application to persons who meet the statutory test "on . . . the effective date of the . . . statute," and "had no prospective application." *Id.* at 310-11. Moreover, as State Amici point out, there are several examples elsewhere in the 1934 Act showing that when Congress meant "later," as opposed to at the time of passage of the Act, it said so. St.Amici 9 (noting, for example, Section 472's use of "now or

hereafter"). Indeed, if the 1934 Congress that enacted the IRA intended "now" to mean far in the future, the inclusion of the term would be mere surplusage – contrary to the basic precept that "statutory terms" should not be treated "as surplusage in any setting." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

It is not surprising, therefore, that every court prior to the First Circuit has read "now" in the IRA to refer to its date of enactment (1934). *See United States v. John*, 437 U.S. 634, 649 (1978) (the IRA is limited to "any recognized [in 1934] tribe now under Federal jurisdiction") (bracket by Court); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004);[1] *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) (Section 479 "positively dictates that tribal status is to be determined as of June, 1934"). The Secretary's extensive reliance on *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), to counter these opinions misses the point.

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[1] The Secretary claims that the Ninth Circuit's quotation of Section 479 of the 1934 Act and its conclusion that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934 . . . ," was nothing more than a "passing observation." Hardly. Had there been no temporal limitation found, the analysis would have been very different. Indeed, the district court, which was affirmed, went through a detailed discussion of the text and history of the 1934 Act before concluding that Section 479 was clearly limited to tribes under federal jurisdiction at the time of the Act's passage. Pet.16-17.

Brand X concerned an administrative interpretation of an *ambiguous* portion of a statute, *id.* at 985, not a clear and unambiguous provision, like the IRA's temporal limitation. The precise question was whether prior judicial precedent could trump a later agency interpretation of an ambiguous statute. *Brand X* held it could not. *Id.* at 983 ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative.").

Brand X's relevance to this case is its confirmation of prior Supreme Court rulings concerning the interpretation of an *unambiguous* statute: "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction," *id.* at 982-83. Such displacement occurs when a court "determine[s] a statute's *clear* meaning." *Id.* at 984 (quoting case; emphasis in original). This Court and the Fifth and Ninth Circuits all read the term "now" in Section 479 as plainly meaning 1934; none of these courts expressed any doubt about that self-evident conclusion. The ambiguity posited by the Secretary and accepted by the First Circuit is insupportable and contrary to all precedent. *See, e.g., Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004) (noting that where several courts have construed a statute and reached the same conclusion, that "consensus [can be] . . . enough to rule out any serious claim of ambiguity"). The unambiguous meaning of the term "now" in

Section 479 is at the time of passage of the Act. An agency does not, of course, receive deference for an erroneous interpretation of an unambiguous statute. *Brown v. Gardner*, 513 U.S. 115 (1994).

For four decades after passage of the IRA, the Secretary took not a single acre of land into trust for a non-1934 Act tribe. *See* Pet.15n.6. The 1981 regulation upon which the Secretary now relies followed that period. The regulation itself, 25 C.F.R. 151.2, moreover, does not purport to construe the term "now"; it merely authorizes trust for any tribe "recognized by the Secretary as eligible for the special programs and services of the Bureau of Indian Affairs." The Secretary and the First Circuit rely on Part 151.2(b), not because it affirmatively rejects the temporal limitation expressed in the term "now," but because it "does not distinguish between tribes recognized before June 18, 1934 and those recognized thereafter." Pet.App.31.

The Secretary's newly-hatched, counter-historical effort to create ambiguity where there is none has vastly expanded the scope of the IRA. If this Court allows the First Circuit decision to stand, the number of Indian tribes for whom land can be taken into trust – and the number of states where this can occur – will be greatly expanded. As more groups press for tribal recognition, the scope of the IRA will expand still further. This Court's intervention is needed to reaffirm the intent of Congress in limiting the reach of the IRA.

II. The Circuit Split Over Aboriginal Title Affects Numerous Settlement Acts and Must be Addressed

Even though the Settlement Act expressly extinguished the Narragansett's aboriginal title to all land in Rhode Island, the Secretary seeks to take land into trust under the IRA for the Tribe. If successful, he will restore a significant aspect of the Tribe's aboriginal title – its sovereign authority over land. The Secretary does not dispute that aboriginal title includes a sovereignty interest in land. Nor does he dispute that a tribe gains a sovereignty interest in land held in trust for it under the IRA. Indeed, the Secretary acknowledges the Supreme Court's observation that Section 465 establishes Indian sovereignty over land. Opp.17. In the face of these basic facts, the Secretary responds by ignoring the thrust of Petitioners' argument and by changing the topic. These efforts fail. The First Circuit's flawed reading of the Settlement Act cannot be reconciled with decisions of the Second and Ninth Circuits and undermines the Settlement Act. The question presented is one of importance to settlement act states nationwide.

Circuit Split. On the critical issue of the scope of aboriginal title, the circuits are split. *See* Pet.27-29. The First Circuit rejects the notion that aboriginal title includes a sovereignty interest, dismissing aboriginal title as a mere "traditional property interest." Pet.App. 43. The Second and Ninth Circuits, on the other hand, regard aboriginal title as inclusive of a sovereignty interest. *Native Village of Eyak v.*

Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998); *Northern Mariana Islands v. United States*, 399 F.3d 1057, 1061-62 (9th Cir. 2005); *Western Mohegan Tribe v. Orange County*, 395 F.3d 18 (2nd Cir. 2004); *accord Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005) (reaffirming that when the Secretary converts land to trust under Section 465 of the IRA, he "reestablishes [Indian] sovereign control over territory"); Cohen's Handbook of Federal Indian Law §15.04 [2], at 969 (N.J. Newton *et al.*, eds. 2005) ("aboriginal title, refers to land claimed by a tribe by virtue of its possession and *exercise of sovereignty*") (emphasis added).

The Secretary tries to avoid review by claiming that, whereas the holdings of the Second and Ninth Circuits establish what interests make up aboriginal title, the First Circuit's holding merely establishes what interests are terminated when aboriginal title is extinguished. Opp.14-16. That distinction cannot withstand scrutiny. A determination of what rights and interests make up the aboriginal estate is a necessary predicate to determining what rights and interests are foreclosed by an extinguishment of that estate. There can be no serious dispute that the circuits are at odds on this keystone issue.

Undermines the Settlement Act. The First Circuit's decision undermines the Settlement Act by permitting the Secretary to give back to the Narragansetts the very sovereignty interests that Congress extinguished in the Act. The Secretary makes several

arguments in indirect response, none of which are availing.

First, the Secretary argues that a settlement act repeals a tribe's ability to reestablish Indian territorial sovereignty through trust only if Congress uses express language to that effect. Opp.13-14. This argument, however, begs the question of what rights are included within the aboriginal title estate. If, as the Ninth and Second Circuits both hold, aboriginal title includes a sovereignty interest, then Congress *does* use express language to foreclose the reestablishment of tribal territorial sovereignty when it extinguishes aboriginal title. By contrast, if, as the First Circuit holds, a sovereignty interest is *not* part of the aboriginal estate, then a congressional extinguishment of aboriginal title does not limit a tribe's ability to reestablish territorial sovereignty through trust.

The Secretary is not telling the entire story when he asserts that Congress specifically precludes the application of Section 465 when it wishes to prohibit trust acquisitions in a settlement act. Opp.14. For support, he cites Section 1724(e) of the Maine Settlement Act and Section 1754(b)(8) of the Pequot Settlement Act. Neither settlement act supports the Secretary's argument and neither cited provision even mentions the IRA, let alone Section 465. While the cited sections do preclude the Secretary from holding certain land in trust for tribes, the sections immediately preceding specifically *require* the Secretary to hold other land in trust for tribes. *See* Maine

Indian Claims Settlement Act, 25 U.S.C. § 1724(d) (requiring certain lands to be held in trust by the Secretary); Pequot Settlement Act, 25 U.S.C. § 1754(b)(7) (same). The Secretary's invocation of these settlement acts adds nothing.[2]

Second, the Secretary asserts that *Sherrill* "endorses a Tribe's ability to reestablish 'sovereign control over territory' (*i.e.*, restore sovereign control that has lapsed)." Opp.17 (quoting *Sherrill*, 544 U.S. at 220-21). That fundamentally misreads *Sherrill*'s relevance to this case. In *Sherrill,* this Court concluded that where the Oneida's aboriginal title to its ancient reservation had lapsed by virtue of the passage of time and tribal inaction, the Oneida could not regain sovereign control over that territory merely by purchasing land in fee. Instead, the Court suggested, the Oneida's sovereign control over its former territory could only be regained through Section 465. *Id.*

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[2] The Secretary claims that our position is that Congress has "effectively extended the provisions of Section 1708(a) of the Settlement Act to all lands in Rhode Island, thereby implicitly limiting the authority of the Secretary as set forth in the IRA." Opp.13. We make no such claim. Section 1708(a) merely establishes the State's civil and criminal jurisdiction over the Settlement Lands. Two other sections – Sections 1705(a) and 1712(a) – extinguish aboriginal title and all other Indian interests in land throughout Rhode Island, and thereby limit the Secretary's trust authority. These extinguishment provisions guarantee the continued application of state law and jurisdiction outside the Settlement Lands by withdrawing Indian territorial sovereignty in Rhode Island and, as a result, prohibit the Secretary from reestablishing that sovereignty through trust.

at 219-21. There is a world of legal difference, however, between a tribe's loss of aboriginal title through laches and a tribe's loss of aboriginal title through an act of Congress. A tribe losing its ability to exercise sovereign control over land through laches may reestablish that control through the trust process, as *Sherrill* notes. A tribe losing its ability to exercise sovereign control over land through an act of Congress may only regain that control by a subsequent act of Congress. *Sherrill* does not concern whether a tribe can somehow reestablish sovereign control over land in the face of a congressional extinguishment of aboriginal title to (and sovereignty over) that land.

Importance. The Secretary argues it is "obvious" that "the question about construing the Settlement Act is not one of general national significance." Opp.17-18. To the contrary, the question is of extraordinary importance. Rhode Island's Settlement Act is one of at least nine settlement acts with congressional extinguishments of Indian interests in land – none of which differ from Rhode Island's in any way material to this Court's review. Millions of acres are subject to these extinguishment provisions. To take just one example, the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.*, extinguishes Native Alaskan aboriginal title over millions of acres – practically the entire state of Alaska – using language that is legally indistinguishable from the Settlement Act. 43 U.S.C. § 1603(b) ("All aboriginal titles, if any, and claims of aboriginal title in Alaska

based on use and occupancy . . . are hereby extinguished").

Moreover, the Secretary has received thousands of requests to convert land to trust for tribes, many from tribes whose land tenure is governed by these settlement acts. An answer by this Court to the second Question Presented will have a profound impact on the allocation of state and tribal territorial sovereignty far into the future.

III. Section 465 of the IRA Violates the Non-Delegation Doctrine

The Secretary concedes that "the level of direction required of Congress" to inform agency discretion "will vary depending upon the nature of the power conferred." Opp.20 (citing *Whitman v. American Trucking Assn.*, 531 U.S. 457, 475 (2001)). He then defends the delegation in Section 465, claiming that where "the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians, broader authorizations are especially appropriate," and suggesting that any limitations should be "less stringent where the entity exercising delegated authority possesses independent authority over the subject." Opp.20-21. The Secretary, however, completely ignores the other side of the trust coin.

Converting land to trust does not involve merely the "supervision" by the Secretary of lands occupied by Indians, it also involves the divestiture by the Secretary of a state's civil and criminal jurisdiction –

certainly something over which the Secretary has no "independent authority." While certain supervisory functions may properly be delegated to executive branch administrators with minimal direction, the power to divest a state of its jurisdiction is not one of those functions.

This Court requires that Congress "must provide substantial guidance," especially where, as here, the conferral of authority has significant scope and dimension. *Whitman*, 531 U.S. at 475. Glaringly absent from the Secretary's defense is any reference to the text of the IRA, and for good reason – it contains no "substantial guidance" to direct the Secretary. Indeed, the Secretary nowhere disputes the lack of guidance provided by Section 465 – whose only "limit" is that land be taken into trust "for Indians."

The Secretary implicitly recognizes the omission of "substantial guidance" when arguing that his own regulations cure any constitutional defect in Section 465. Opp.21. In *Whitman,* however, this Court held that it has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472. The Secretary also looked to the legislative history of the IRA for guidance (a legislative history that even the First Circuit found "does not clearly resolve the issue," Pet.App.23). Opp.22. *Whitman,* however, requires that "Congress must 'lay down by legislative act an intelligible principle to which'" the Secretary is "directed to conform." 531 U.S. at 472. Neither the Secretary's

regulations nor the legislative history can provide the "substantial guidance" necessary.

The Secretary's construction of the term "now" in Section 479 would greatly expand the reach of the IRA, thereby magnifying the states' concerns. Pet.4n.2. The awesome authority conferred by Section 465 to divest state sovereignty without any guidance from Congress is unconstitutional and warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Governor Donald L. Carcieri
By His Attorney,

CLAIRE RICHARDS*
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

State of Rhode Island
By Its Attorney,

PATRICK C. LYNCH
Attorney General

NEIL F.X. KELLY*
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor
for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

Counsel for Petitioners
**Counsel of Record*

AMICUS CURIAE BRIEF

73

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IN THE
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, FLORIDA, IDAHO, ILLINOIS, IOWA, KANSAS, MASSACHUSETTS, MISSOURI, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

RICHARD BLUMENTHAL
ATTORNEY GENERAL OF CONNECTICUT
*Robert J. Deichert
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Ph. (860) 808-5020; FAX (860) 808-5347
* Counsel of Record

[Additional Appearances on Inside Cover]

TROY KING
Attorney General of Alabama

TALIS J. COLBERG
Attorney General of Alaska

DUSTIN McDANIEL
Attorney General of Arkansas

BILL McCOLLUM
Attorney General of Florida

LAWRENCE G. WASDEN
Attorney General of Idaho

LISA MADIGAN
Attorney General of Illinois

TOM MILLER
Attorney General of Iowa

PAUL J. MORRISON
Attorney General of Kansas

MARTHA COAKLEY
Attorney General, Commonwealth of Massachusetts

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

WAYNE STENEHJEM
Attorney General of North Dakota

W.A. DREW EDMONDSON
Attorney General of Oklahoma

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania

LAWRENCE E. LONG
Attorney General of South Dakota

MARK L. SHURTLEFF
Attorney General of Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE WRIT 4

I. THE FIRST CIRCUIT MISAPPLIED *CHEVRON* DEFERENCE TO VASTLY EXPAND THE SECRETARY'S AUTHORITY TO LIMIT STATES' JURISDICTION OVER LANDS WITHIN THEIR BORDERS 4

II. THE STATES NEED GUIDANCE AS TO HOW SETTLEMENT ACTS WILL BE INTERPRETED 12

III. THE FIRST CIRCUIT APPLIED INCORRECT ANALYSIS TO REACH THE WRONG RESULT ON PETITIONER'S NONDELEGATION CLAIM 18

CONCLUSION 23

LIST OF SETTLEMENT ACTS ..... App. 1

TABLE OF AUTHORITIES

Cases

Antoine v. Washington, 420 U.S. 194 (1975) 17

Barnhart v. Thomas, 540 U.S. 20 (2003) 11

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Connecticut v. DOI, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) 16

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546 (2005) 22

FMC v. S.C. State Ports Auth., 535 U.S. 743 (2002) 20

Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004) 6

Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823) 13

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 2, 5

Lamie v. United States Tr., 540 U.S. 526 (2004) 10, 11

Massachusetts v. EPA, 127 S. Ct. 1438 (2007) 6

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 14

Montana v. Kennedy, 366 U.S. 308 (1961) 5

Montana v. U.S., 450 U.S. 544 (1981) 14

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 13

Printz v. United States, 521 U.S. 898 (1997) 19

Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006) 19

Shoshone Tribe of Indians v. U.S., 299 U.S. 476 (1937) 13

South Dakota v. Department of Interior, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006) 19

South Dakota v. DOI, 69 F.3d 878 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996) 21, 22

Taylor v. Monroe County Bd., 421 F.2d 1038 (5th Cir. 1970) 8

U.S. v. Mazurie, 419 U.S. 544 (1975) 14

U.S. v. Winans, 198 US. 371 (1905) 14

United States v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir. 1980) 16

United States v. John, 437 U.S. 634 (1978) 2, 5

United States v. State Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) 2, 5, 6

Weedin v. Chin Bow, 274 U.S. 657 (1927) 8

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 14

Whitman v. Am. Trucking Assocs., Inc., 531 U.S. 457 (2001) 4, 21, 22

Winters v. U.S. 207 U.S. 564 (1908) 14

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 13

Statutes, Regulations and Legislative Materials

25 U.S.C. § 465 ..... passim

25 U.S.C. § 468 9

25 U.S.C,.§ 472 9

25 U.S.C. § 479 ..... passim

25 U.S.C. § 1705(a) 15

25 U.S.C. § 1708(a) 15

25 C.F.R. § 1.2 23

25 C.F.R. § 1.4(a) 1

25 C.F.R. § 151.11 23

H.R. 2176, 110th Congress (2007) 13

H.R. 3048, 110th Congress (2007) 13

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States (the "*Amici* States"),[1] through their Attorneys General, submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Rhode Island.[2]

The *Amici* States have a vital interest because the First Circuit's decision misinterprets the Indian Reorganization Act of 1934 ("the IRA")—which grants the Secretary of the Interior ("the Secretary") unfettered discretion to take land within any State into trust "for Indians"—and the Rhode Island Indian Claims Settlement Act ("the Settlement Act"), which contains provisions mirrored in settlement acts nationwide. Land taken into trust is removed from state authority in several respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the State's ability to exercise its police powers to protect the public both on the trust land and in the surrounding communities. 25 C.F.R. § 1.4(a). Thus, the result of taking land into trust is the creation of an area largely controlled by a competing sovereign within a State's borders without its consent.

The Secretary has already taken into trust several million acres nationwide pursuant to 25 U.S.C. § 465 (an area approximately twice the size

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[1] Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota and Utah.

[2] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land. The *Amici* States have a compelling interest in having this Court define the proper application of the IRA, particularly in conjunction with settlement acts, and determine whether Congress' delegation of the trust power in § 465 is constitutional.

SUMMARY OF THE ARGUMENT

This petition centers on the limits on the Secretary's authority to take land into trust for Indian tribes, thereby removing it from state jurisdiction in many critical respects. Congress intended that there be some limits and the Constitution requires them. The First Circuit, however, dismantled those limits to expand the Secretary's authority at the States' expense, contrary to this Court's precedents, Congress' intent and the Constitution.

The first check on the Secretary's authority that the First Circuit dismantled is the IRA's requirement that the Secretary take land into trust only on behalf of "any recognized tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). This Court's precedents—and those of every circuit court to previously address the issue—establish that the "now" limitation unambiguously refers to tribes recognized as of the IRA's 1934 enactment. *See United States v. John*, 437 U.S. 634, 650 (1978); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004); *United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974). Despite the weight of authority correctly finding

the IRA unambiguous, the First Circuit improperly injected ambiguity into the IRA where there is none to defer to the Secretary's claim that "now" means whenever the Secretary decides to act.

Having surmounted the first obstacle, the First Circuit moved on to interpreting the Settlement Act, which was negotiated between Rhode Island and the Narragansett Tribe ("the Tribe") and codified by Congress. The Settlement Act was intended to maintain state jurisdiction on the Tribe's settlement lands and extinguish all land claims on behalf of the Tribe that could be "raised by *Indians qua Indians*," including trust claims, to protect the State's jurisdiction beyond the settlement lands. *Pet. App.*, 74 (Howard J., dissenting) (quotation marks omitted) (emphasis in opinion). The First Circuit, however, read the Settlement Act in a manner that rendered the bargain between Rhode Island and the Tribe effectively meaningless by allowing the Secretary to remove lands outside the settlement area from Rhode Island's jurisdiction.

That result was inconsistent with the intent of the parties and Congress, prompting both Judge Selya and Judge Howard to write powerful dissents. Judge Selya characterized the majority's interpretation as "error of the most deleterious kind" on an issue "of paramount importance to both the State and the Tribe." *Id.*, 80-81 (Selya, J., dissenting). In light of that importance, he pointed out that review by this Court "is a consummation devoutly to be wished." *Id.* The *Amici* States agree. The First Circuit's interpretation will have ramifications far beyond Rhode Island. Congress

has codified fifteen settlement acts and more are on the horizon. The States and others negotiating such agreements need this Court's guidance as to how they will be interpreted.

The First Circuit's removal of the barriers Congress imposed on the trust power leads into the third question presented, whether § 465 is an unconstitutional delegation of legislative authority. In making that determination, courts must consider the scope of the power being delegated when assessing whether Congress has set forth a sufficient intelligible principle. *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 475 (2001). The First Circuit failed to do so. If it had, it would have been clear that § 465 is unconstitutional in light of the trust power's infringement on state sovereignty and the limited guidance Congress provided to control its exercise.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT MISAPPLIED *CHEVRON* DEFERENCE TO VASTLY EXPAND THE SECRETARY'S AUTHORITY TO LIMIT STATES' JURISDICTION OVER LANDS WITHIN THEIR BORDERS

The first question presented—whether the IRA authorizes the Secretary to acquire land for the Narragansett Tribe—is both simple and dispositive. By its terms, the IRA allows the Secretary to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defines "Indian" to "include all persons of Indian

descent who are members of any recognized tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). That unambiguously limits the IRA's application—and the Secretary's trust authority—to tribes under federal jurisdiction as of the IRA's 1934 enactment.

Prior to the decision below, every court to address the issue—including this Court—agreed with that reading. *See John,* 437 U.S. at 650; *Kahawaiolaa,* 386 F.3d at 1280; *State Tax,* 505 F.2d at 642. Those decisions were consistent with this Court's prior holdings that the plain meaning of the statutory term "now" includes only individuals who were citizens "*on* . . . the effective date of the . . . statute." *Montana v. Kennedy,* 366 U.S. 308, 311 (1961) (emphasis in original). Despite the weight of that authority, the First Circuit held that the IRA was ambiguous and upheld the Secretary's reading—which renders the "now" limitation surplusage—based on *Chevron* deference. That decision directly conflicts with at least three of this Court's decisions (*John, Montana* and *Chevron*) and their progeny—as well as several circuit court decisions—and should be reversed. More importantly, it expands the Secretary's authority to take land into trust far beyond the limits intended by Congress, with negative impacts on States and their citizens.

The framework for reviewing the Secretary's interpretation of the IRA is clear. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is

clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Where several courts have construed the statute and reached the same conclusion, that "consensus [can be] . . . enough to rule out any serious claim of ambiguity." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004).

Here, the First Circuit improperly stretched "to read ambiguity into a clear statute." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1461 (2007). Put simply, "now" unambiguously means at the time of the enactment, not whenever in the future the Secretary may choose to act. This Court and every other appeals court to address the issue has understood that. Specifically, this Court noted that "[t]he 1934 Act defined 'Indians' as [*inter alia*] . . . 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction.'" *John*, 437 U.S. at 650 (latter bracketed material in original) (quoting 25 U.S.C. § 479). The circuit courts stated their views even more definitively. The Ninth Circuit concluded that the IRA "by its terms" did not apply to tribes not under federal jurisdiction in 1934[3] and the Fifth Circuit held that the statute "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *State Tax*, 505 F.2d at 642 (emphasis in original) (quotation marks omitted).

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[3] *Kahawaiolaa*, 386 F.3d at 1280.

The First Circuit declined to address the conclusions of its fellow circuit courts and brushed off this Court's statement in *John* by concluding that it "seems to fall short even of being dicta." *Pet. App.*, 23. Even if that were true—Petitioners persuasively argue that it is not, *Pet.*, 17-18—the First Circuit missed the point. Whether or not the unanimous conclusions of this Court and other circuit courts are binding, they strongly support the conclusion that the IRA's text unambiguously limits its application to tribes recognized in 1934. *Cline*, 540 U.S. at 594.

This Court's decision in *Montana* is instructive. *Montana* involved the interpretation of statutes governing citizenship. The Seventh Circuit held that "a fifty-five year old man who has resided in this country since he was an infant" could not validly claim citizenship under those statutes and could be deported. *Montana*, 366 U.S. at 309-10. This Court "granted certiorari to review that conclusion in view of the apparent harshness of the result entailed." *Id.* at 309. It nonetheless held that it was bound by the clear language of the statutes and affirmed the decision below. *Id.*

There, as here, the outcome of one of the petitioner's claims hinged on the meaning of the term "now." This Court held that the statute—which applied to "children of persons who *now* are, or have been, citizens of the United States"—encompassed only individuals who were citizens "*on* . . . the effective date of the . . . statute" and that the statute "had no prospective application." *Id.* at 310-311 (first emphasis added; second in original). Therefore, the petitioner's claims had to

fail. That reading was consistent with the view of commentators and this Court's decisions issued prior to the IRA's enactment. *Id.* at 312 (citing *inter alia Weedin v. Chin Bow*, 274 U.S. 657 (1927)). Thus, this Court has consistently made clear that "now" means at the time of enactment.

The First Circuit could not challenge this Court's holdings and, indeed, acknowledged that "[o]ne might have an initial instinct to read the word 'now' in the statute as the State does, to mean the date of enactment of the statute, June 18, 1934." *Pet. App.*, 19. Nor could the First Circuit dispute that every court to address the IRA's use of the term "now" read it to unambiguously refer to the date of enactment. Nor could it address other circuit court decisions interpreting the term the same way. *See, e.g., Taylor v. Monroe County Bd.*, 421 F.2d 1038, 1041 (5th Cir. 1970). The First Circuit nonetheless declined to construe the IRA according to its plain language.

In so doing, it stretched to find any authority that could somehow support an ambiguity. The best it could find was a circuit court decision concerning disability benefits and two state court decisions, all of which post-dated the IRA's enactment by at least 45 years. *Pet. App.*, 20. Those decisions have little, if any, value in determining what Congress intended when it enacted the IRA in 1934 and they are insufficient to establish ambiguity in light of the overwhelming authority to the contrary.

Given that the IRA's text unambiguously applies only to tribes that were under federal

jurisdiction in 1934, the First Circuit should have ended its analysis with the text and ruled in Rhode Island's favor. Instead, after straining to find an ambiguity in the clear text, the court went on to "look to context" and concluded that it too is "equivocal." *Pet. App.*, 20. It is not.

The IRA itself shows that the 1934 Congress was capable of drafting language that applies both before and after the IRA's enactment. Rather than using the phrase "now," as it did in 25 U.S.C. § 479, it used the phrase "now or hereafter" or something similar. That distinction is demonstrated elsewhere in the IRA. For example, § 465 itself refers to "measures *now* pending in Congress," which, of course, means measures pending at the time of the IRA's enactment. (emphasis added). By contrast, § 468 encompasses both past and future by referencing land outside the boundaries "of any Indian reservation *now existing, or established hereafter.*" (emphasis added). § 472 further illustrates the point, referring to "positions maintained, *now or hereafter*, by the Indian Office." (emphasis added). Thus, if the plain meaning of the text alone was not enough, viewing it in context makes the point pellucid—by using "now" in § 479, Congress unambiguously encompassed only tribes under federal jurisdiction in 1934.

Again faced with overwhelming evidence of Congress' intent, the First Circuit sought another way to circumvent it and defer to the Secretary. It did so by adopting the Secretary's argument that there was ambiguity because § 479 "specifies the date of June 1, 1934 as the relevant date for determining eligibility based on 'residing within

the present boundaries of any Indian reservation.'" *Pet. App.*, 20. That argument fails on its face. There simply is no inconsistency in Congress' use of "now" to refer to the IRA's effective date—June 18, 1934—and its use of "June 1, 1934" to measure certain individuals' status.

The First Circuit's finding of ambiguity in the IRA's text and context was error. That error led the court to make "too quick a turn" to legislative history and further err by interpreting that history to favor the Secretary despite substantial evidence indicating that Congress intended that the IRA encompass only 1934 tribes. *Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004).

Contrary to the First Circuit's decision, the IRA's legislative history demonstrates that § 479's "*now* under federal jurisdiction" language was inserted into the statute for the precise purpose of limiting the reach of the IRA to then-existing tribes. (emphasis added). Specifically, an early draft IRA defined "Indian" to *inter alia* "'include all persons of Indian descent who are members of any recognized Indian tribe.'" *Pet. App.*, 23-25. Senators expressed concern about whether that definition would sufficiently ensure *bona fide* status and, in response, Commissioner Collier proposed the "now" limitation, which Congress ultimately adopted. *Id.*

As if to provide an object lesson for this Court's warnings of "the difficulty of relying on legislative history" to establish ambiguity "and the advantage of" resting holdings "on the statutory

text," the First Circuit took that exchange and twisted it into a source of ambiguity. *Lamie*, 540 U.S. at 542. Specifically, the court concluded that "although none of the parties have raised this, it may well be that the phrase 'now under federal jurisdiction,' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" *Pet. App.*, 25. This is the ultimate stretch to find ambiguity where none exists. The statute applies to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It strains credulity to claim that the "now" was intended to modify "members." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reversing statutory reading contrary to "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). That is presumably why the federal respondents did not make the argument below and why the First Circuit was forced to create it out of whole cloth.

Put simply, the First Circuit failed "to adhere to [its] . . . constitutional role[] . . . [to] determine intent from the statute before [it]." *Lamie*, 540 U.S. at 542. Faced with clear expressions of congressional intent at every turn, it strained to find some basis to conclude there is ambiguity that would allow it to defer to the Secretary. In so doing, it contravened the text of the statute, several lines of this Court's authority, several circuit court decisions and, indeed, the proper balance of power between Congress and the Executive Branch. As a consequence, it has vastly

expanded the Secretary's power by allowing him to take land into trust on behalf of not only all tribes now in existence, but also any tribes the Secretary uses his regulatory authority to recognize in the future. This incorrect decision has national importance and should be reversed.

II. THE STATES NEED GUIDANCE AS TO HOW SETTLEMENT ACTS WILL BE INTERPRETED

Before the First Circuit's decision, it appeared that federal law provided Rhode Island two separate levels of protection from having land within its borders taken into trust on behalf of the Narragansett Tribe. The first was the IRA, which unambiguously does not permit the Secretary to exercise the trust power on behalf of the Tribe. The second was the Settlement Act—negotiated between Rhode Island and the Tribe through the court process and codified by Congress—which was intended to extinguish all land claims on behalf of the Tribe that could be "raised by *Indians qua Indians*." *Pet. App.*, 74 (Howard J., dissenting) (quotation marks omitted) (emphasis in opinion). The First Circuit dismantled both of those barriers to the Secretary's trust power, contrary to Congress' intent. That was an error of national importance and this Court should correct it.

Like the First Circuit's analysis of the IRA, its analysis of the Settlement Act improperly strains to find a way to avoid Congress' apparent intent curtailing the Secretary's power. If allowed to stand, that error may have repercussions

nationwide. Congress has codified sixteen settlement acts, impacting land in at least eleven States. *See App.*, 1. More are on the horizon.[4] Several of those Acts include provisions that mirror the Rhode Island Settlement Act, including provisions extinguishing aboriginal title.

The First Circuit vitiated such provisions by concluding that Congress' extinguishment of the Tribe's aboriginal title for all lands outside the settlement area did not preclude the Secretary from later acquiring such land and restoring the Tribe's regulatory authority over it. That is inconsistent with this Court's precedent and the intent of Congress and the parties. Although "only a right of occupancy," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974), the understanding that "aboriginal title" includes tribal jurisdictional authority over land has long been imbedded in this Court's decisions. Aboriginal title included the right of tribes "to use [the soil] according to their own discretion." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 574 (1823). Tribes had "territorial boundaries, within which their authority [was] exclusive." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). They enjoyed "any and all beneficial uses of the land." *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476, 496 (1937). Within their lands, tribes "possessed rights with which no state could interfere," *Worcester*, 31 U.S. at 559, including the right to exclude non-Indians. Id. at 561. When they possessed unfettered aboriginal

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[4] Two land claim settlement bills are currently pending in Congress. *See* H.R. 2176, 110th Congress (2007); H.R. 3048, 110th Congress (2007).

title, "[t]he Indians had *command* of the lands . . . *command* of all their beneficial use . . . ." *Winters v. U.S.*, 207 U.S. 564, 576 (1908) (emphasis added). "Command" necessarily includes the ancient equivalent of tribal jurisdiction over lands in which aboriginal title has not been extinguished.

The broad scope of aboriginal title means that treaties between tribes and the United States are "not a grant of rights to the Indians, but a grant of right from them." *U.S. v. Winans*, 198 US. 371, 381 (1905). Reserved tribal treaty rights are "a remnant of the great rights [tribes] possessed" before their aboriginal title was extinguished. Id. at 384. Thus, "'Indian tribes within 'Indian country' . . . possess[] attributes of sovereignty over both their members *and their territory*." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added)), a sovereignty that includes "an inherent power necessary to tribal . . . territorial management." *Merrion*, 455 U.S. at 141. Indeed, "there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

Tribal sovereignty to regulate the use of land continues where that aboriginal right has not been terminated. *See e.g., Montana v. U.S.*, 450 U.S. 544, 557 (1981) (confirming that a tribe's reserved aboriginal right to regulate hunting and fishing by non-Indians continues undisturbed on those portions of its reservation remaining in tribal ownership or in trust.). Thus, the "geographic component to tribal sovereignty" *White Mountain*, 448 U.S. at 151, is derived from an aboriginal title

that includes the exercise of tribal governmental authority over tribal land, a governmental authority that continues until extinguished.

It is this aspect of extinguished aboriginal title—tribal governmental authority over land—that the First Circuit ignored. It recognized that taking land into trust grants "primary jurisdiction" to "the federal government and the Indian tribe inhabiting [the trust land], not . . . the state." *Pet. App.* at 5. It also acknowledged that "the Tribe abandoned its claims of aboriginal title" and that "Congress approved and codified that agreement in the Settlement Act." *Id.* at 23. The Settlement Act extinguished the Tribe's aboriginal title to "any [past] transfer of land or natural resources located anywhere within the United States," extinguished all tribal claims against Rhode Island involving those lands, and rendered the settlement lands subject to Rhode Island's jurisdiction. 25 U.S.C. §§ 1705(a)(1), (a)(2) and (a)(3), 1708(a).

Yet, incongruously, the First Circuit ruled that—despite Congress' extinguishment of aboriginal title and the constituent tribal authority over land subsumed within it—the Secretary may take additional Rhode Island land into trust, displacing state jurisdiction on a piecemeal basis and reinvigorating a primary aspect of the tribe's congressionally-extinguished aboriginal title. The First Circuit's failure to appreciate that the extinguishment of aboriginal title extinguishes the tribe's right to exercise regulatory authority over land completely undermines the State's reason for entering into the settlement (the preservation of state jurisdiction) and upsets the delicate balance

negotiated by the Tribe and State, a result that allows the Tribe "to walk away from an arrangement that it helped to fashion and from which it has benefited over the years." *Pet. App.*, 81 (Selya, J., dissenting). In sum, the First Circuit ignored a core ingredient of the Rhode Island land settlement: to identify with certainty and finality the scope of those lands which were, or could be, set aside for tribal occupation and to address with equal clarity the jurisdictional consequences of that set aside.

This Court has not yet definitely spoken as to how a settlement act's extinguishment provision impacts the Secretary's authority under § 465. Nor has it spoken to the broader issue of whether, and how, the Indian canon and other rules of construction should apply to modern settlement acts. The circuits are split on that issue, with the Ninth Circuit concluding that the Indian canon does not apply with force to such acts and the Second Circuit, and now the First Circuit, indicating to the contrary. *Compare United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir. 1980) (Kennedy, J., on panel) *with Connecticut v. DOI*, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). It is difficult to overstate the issue's importance in light of the growing wealth of many Indian tribes nationwide. *See, e.g., Connecticut*, 228 F.3d at 85 (noting that "[i]n less than a decade the . . . Mashantucket Pequot Tribe developed one of the most profitable casinos in the United States . . . grossing nearly $1 billion annually"). As the Second Circuit recognized after construing Connecticut's settlement act in favor of the tribe:

> Motivating all of plaintiffs' arguments is their final claim that a decision today in defendants' favor would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut. And indeed, we find nothing in the Settlement Act itself that would prevent such a result.

Id. at 94. That illustrates how crucial the interpretation of settlement acts is to States—unfettered, the trust power has the capacity to change the character of an entire State.

In contrast to treaties and compacts, settlement acts represent the culmination of an adversary process during which the parties operate under the watchful eye of a federal judge.[5] There is no evident reason why courts should construe them—as the First Circuit did—to make every inference in favor of the Tribe and the Secretary's power even where that leads to the bizarre result that the Secretary can unilaterally undo the bargain administratively decades after the fact. *Pet. App.*, 75-76 (Howard, J., dissenting).

The First Circuit's decision tells States that have negotiated—or will negotiate—settlement acts

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[5] Modern settlement acts' genesis in the adversary process and concomitant oversight by a court—both of which serve to ensure the Tribe's interests are protected—distinguish such agreements from other treaties and statutes ratifying agreements with Indians and tribes. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 200 (1975).

that, no matter what the understanding is between the State and the Tribe or the circumstances, those acts will be construed against the State and interpreted so as to impose as little restraint as possible on the Secretary's power. The *Amici* States agree with the dissenters and Petitioners that the First Circuit's message is wrong both as a matter of law and of policy. Even if this Court disagrees, it is important to clarify how settlement acts nationwide should be construed—at the very least, States need to know the ground rules in order to protect their interests now and in the future.

III. THE FIRST CIRCUIT APPLIED INCORRECT ANALYSIS TO REACH THE WRONG RESULT ON PETITIONER'S NONDELEGATION CLAIM

This case stands at the intersection of two core constitutional principles: state sovereignty and the nondelegation doctrine. This Court has not definitively spoken on the level of guidance Congress must provide an agency exercising a power—such as the trust power—that directly and negatively impacts state sovereign interests. In the absence of guidance, lower courts have treated all agency powers the same: in their view, Congress need provide no more guidance to the Secretary concerning when he can take land into trust and impact state jurisdiction than Congress must provide the Administrator of the EPA "regarding the manner in which [the agency] is to define 'country elevators.'" *Whitman*, 531 U.S. at 475. Such a result is inconsistent with this Court's

decisions and our constitutional framework and this Court should correct it.

Whitman reasserted the viability of the nondelegation doctrine and provided valuable guidance as to how courts should apply its principles, instructing that the "scope of the power congressionally conferred" is a critical part of the inquiry: where Congress confers a power that has broad scope, the statute must provide "substantial guidance" to the agency. *Id.* *Whitman*'s guidance failed to register with the First Circuit, just as it has with the other circuit courts to uphold § 465 against a nondelegation challenge.[6] That was error. If the nondelegation doctrine means anything, it must mean that Congress is required to provide more substantial guidance when delegating to the Secretary the expansive authority to take land into trust.

The trust power is unique both in its constitutional sensitivity and its practical scope. Its exercise directly encroaches on a State's right to territorial integrity, a right recognized in several constitutional provisions and decisions of this Court. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-19 (1997). Where such "fundamental aspects of state sovereignty" are concerned, mere "administrative convenience" is not sufficient to overcome the States' interests. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002).

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[6] *See, e.g., South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006).

The trust power's broad practical scope vividly illustrates why substantial Congressional guidance is necessary to control its exercise. The trust power allows the Secretary to take land anywhere—no matter how far removed from the tribe's reservation—into trust, thereby severely limiting the State's ability to protect its citizens' health, safety, and welfare. Beyond that, the Secretary's exercise of the trust power creates an area controlled by a competing sovereign within the State's borders without the State's consent, either directly or through congressional guidance and direction. Few, if any, other powers have such direct, fundamental and negative impacts on state sovereignty. The Secretary has already taken into trust several million acres nationwide pursuant to § 465 and receives a large number of applications annually to take additional land into trust. Each of those potential trust acquisitions has substantial reverberations for the impacted States and their local communities.

That scope and impact were common to the prior circuit court decisions and to the First Circuit's decision and was ignored by each of the courts that upheld § 465. However, the First Circuit expanded the scope of the trust power to a degree never seen by any court by interpreting the term "Indian" to encompass all tribes regardless of when they are federally recognized. In so doing, the court substantially expanded the trust power's scope, and magnified § 465's already significant constitutional infirmity. No State is safe from the Secretary's authority under the First Circuit's reading. Even those that presently have no

recognized tribes or Indian land are at risk that the Secretary will use his regulatory authority to recognize tribes in the future and then take land into trust on their behalf. The threat is real: there are hundreds of non-federally recognized tribes nationwide, many of which are seeking federal recognition.

When the trust power's nationwide scope and direct impact on state sovereign interests are considered, it becomes evident that the nondelegation doctrine requires that Congress provide "substantial" guidance to control the Secretary's exercise of that authority, if Congress can delegate it at all. *Whitman*, 531 U.S. at 472; *see also id.* at 487 (Thomas, J., concurring) (concluding that certain decisions are simply too important to be delegated). The First Circuit failed to even address that question. If it had, it would have been clear that the IRA does not provide a sufficient intelligible principle.

The "guidance" the IRA's text provides is extremely limited and provides effectively no limit on how the Secretary exercises the trust power. § 465. As the Eighth Circuit initially recognized, the IRA by its terms, "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *South Dakota v. DOI*, 69 F.3d 878, 882 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996). No other court has challenged this conclusion, or found any significant limitation on the trust power in the text of the IRA. Consequently, the First Circuit—and other circuits to address the issue—have been forced to rely on §

465's legislative history to provide the constitutionally required intelligible principle. *Pet. App.* 57. That is improper.

Allowing the Secretary to exercise such far-reaching power guided only, or even primarily, by legislative history is problematic. This Court recognized as much in *Whitman*, providing that "[w]hen Congress confers its decision-making authority on agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (emphasis added; quotation marks omitted). This Court has "repeatedly held" that legislative history is not a "legislative act." *See, e.g., Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). Nor does it provide meaningful guidance upon which to base the exercise of substantial power. "[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Id.* (citation omitted).

This case is an excellent example of why statutory text, rather than legislative history, must provide the guidance the Constitution requires. The legislative history at issue here is contradictory. *See, e.g., South Dakota v. DOI*, 423 F.3d 790, 798 (8th Cir. 2005) (noting that "the legislative history frequently mentions landless Indians" and citing examples). The Secretary has, however, chosen to apply the statute much more broadly than those portions of its legislative history would indicate. In

so doing, the Secretary has picked out his "friends" and discarded the inconvenient information. *See Exxon*, 545 U.S. at 568.

The Secretary has taken advantage of the vacuum left by the lack of congressional guidance to seize unfettered power. Although he has promulgated rules that contain factors for the consideration of whether lands are located "outside of and noncontiguous to the tribe's reservation" when taking land into trust, 25 C.F.R. § 151.11, those rules do not actually limit his discretion. He has retained the ability to "waive or make exceptions" to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian." 25 C.F.R. § 1.2. Thus, the end result is an agency fiefdom, with the Secretary wielding extraordinary power constrained only by his discretion and without any real congressional guidance. That may be sufficient to avoid an unconstitutional delegation in some situations, but it is not here. The trust power is unique and has a national scope. Congress cannot constitutionally delegate such a power without imposing more meaningful limitations on how the agency exercises it.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request that the Court grant the Petition for a Writ of Certiorari.

RICHARD BLUMENTHAL
Attorney General of
Connecticut

*Robert J. Deichert
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020
FAX (860) 808-5347

LIST OF SETTLEMENT ACTS

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. § 941 *et seq.*

Rhode Island Land Claims Settlement, 25 U.S.C. § 1701 *et seq.*

Maine Indian Claims Settlement, 25 U.S.C. § 1721 *et seq.*

Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Connecticut Indian Land Claims Settlement, 25 U.S.C. § 1751 *et seq.*

Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. § 1772 *et seq.*

Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773 *et seq.*

Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. § 1774 *et seq.*

Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775 *et seq.*

Crow Land Claims Settlement, 25 U.S.C. § 1776 *et seq.* (impacting lands in Montana).

Santo Domingo Pueblo Land Claims Settlement, 25 U.S.C. § 1777 *et seq.* (impacting lands in New Mexico).

Torres-Martinez Desert Cahuilla Indians Claims Settlement, 25 U.S.C. § 1778 *et seq.*

Cherokee, Choctaw and Chickasaw Nations Claims Settlement, 25 U.S.C. § 1779 *et seq.* (impacting lands in Oklahoma).

Pueblo De San Ildefonso Claims Settlement, 25 U.S.C. § 1780 *et seq.* (impacting federal land); *Alaska Native Claims Settlement Act*, 43 U.S.C. § 1601 *et seq.*

AMICUS CURIAE BRIEF

83

(4)

No. 07-526

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island; STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND, PETITIONERS

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the Department of the Interior, United States; FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION and THE RISC FOUNDATION, INC. AS AMICI CURIAE SUPPORTING PETITIONERS

LANA E. MARCUSSEN
CIRCA
4518 N. 35th Place
Phoenix, AZ 85018
(602) 635-1500

BRUCE N. GOODSELL
Counsel of Record
16 High Street
Westerly, RI 02891
(401) 596-1948

Attorneys for Amici Curiae

CURRY & TAYLOR • (202) 393-4141

MOTION OF THE CITIZENS EQUAL RIGHTS FOUNDATION AND THE RISC FOUNDATION, INC. FOR LEAVE TO FILE A BRIEF PURPORTED TO BE FILED OUT OF TIME AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Citizens Equal Rights Foundation and The RISC Foundation, Inc. respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari submitted by the Petitioners. It has been suggested by the Respondent that the filing of this brief is filed out of time. The *Amici* believe that they have complied with the new Rule 37.2(a) and have filed their brief timely for the following reasons.

1. Rule 37.2(a) provides, in pertinent part, that the brief of an *amicus curiae* "shall be filed within 30 days after the case is placed on the docket **or a response is called for by the Court, whichever is later**, ... (Emphasis added.) This case was placed on the Court's docket on October 23, 2007.

2. On November 16, 2007, it came to the attention of Counsel for the *Amici* that the Respondent had applied for an extension of time in which to file their response. On Monday, November 19, 2007, the *Amici* Counsel of Record enquired of the Clerk's office as to the granting of the request and was informed that the extension to file the response was granted to December 26, 2007.

3. Upon inquiry to the Clerk's office staff on November 19, 2007 Counsel for *Amici* was assured that its time to file was continued to the Response due date. This was confirmed by the Clerk's Office. This information was consistent with Counsel for the *Amici*'s reading of the above quoted section of the rule. (The President of CERA, independently, received the same information regarding the extension of the time to file the *Amici*'s brief.)

4. Subsequently, letters requesting consent to file this brief were sent to the parties on December 10-11, 2007. Prior to December 26, 2007 the Respondent requested an additional extension to file on January 25, 2008, which was also granted. *Amici* received notice from the Respondent and the Clerk of granting this extension and presumed that the previous information of the Clerk applied, as well, to this extension, hence the present filing.

5. The Respondent, Solicitor General, on January 23, 2008, on inquiry regarding the request for consent made on December 10, 2007, raised the issue of the timeliness of this filing, warranting this motion.

As this motion regarding the interpretation of the new rule in this context is one of first impression, the *Amici* respectfully request review of the rule text for clarification and, in consideration of the critical concerns substantively raised in the attached brief, *Amici* respectfully request that leave to file be granted.

Respectfully submitted,

BRUCE N. GOODSELL
Counsel of Record
16 High Street
Westerly, RI 02891
(202) 289-8928

January 25, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT. 2

ARGUMENT 2

CONCLUSION 23

APPENDIX

Department of the Interior, Memorandum for the Press (2/13/1934) 1c
Bulletin – The Howard/Wheeler Bill – Q&A 7c
Statement by Commissioner John Collier 13c

TABLE OF AUTHORITIES

Page

CASES

CITY OF SAULT STE. MARIE V. ANDRUS, 532 F.SUPP 157, 167-8 (D.D.C. 1980) 19
CITY OF SHERRILL V. ONEIDA INDIAN NATION, 544 U.S. 197 (2005) 2
CITY OF TACOMA V. ANDRUS, 457 F.SUPP 342 (D.D.C. 1978) 18
DRED SCOTT V. SANDFORD, 60 U.S. 393 (1857) 6, 7
ELK V. WILKINS, 112 U.S. 94 (1884) 14
HYNES V. GRIMES PACKING, 337 U.S. 86, 123 (1949) 15
MCCLANAHAN V. ARIZONA, 411 U.S. 164 (1973) 16
MORTON V. MANCARI, 417 U.S. 535, 545 (1974) 16, 19
MESCALERO APACHE V. JONES, 411 U.S. 145 (1973) 16
ONEIDA INDIAN NATION V. COUNTY OF ONEIDA, 414 U.S. 661 (1974) 2
SAENZ V. ROE, 526 U.S. 489, 502 FN. 15 (1999) 22
STEVENS V. COMMISSIONER OF THE INTERNAL REVENUE, 452 F.2D 741 (9TH CIR. 1971) 16
UNITED STATES AS GUARDIAN OF THE WALAPAI V. SANTA FE PACIFIC RAILROAD, 314 U.S. 339 (1941) 11, 12, 13
UNITED STATES EX REL KENNEDY V. TYLER, 269 U.S. 13 (1925) 6
UNITED STATES V. JOHN, 437 U.S. 634, 645-46, 650 (1978) 9
UNITED STATES V. KAGAMA, 118 U.S. 375, 384-5 (1886) 16
WILLIAMS V. LEE, 358 U.S. 217, 220 (1959) 22

STATUTES

25 U.S.C. § 177 2
25 U.S.C. § 463 ..... 18, 19
25 U.S.C. § 463 - § 464 18
25 U.S.C. § 464 18
25 U.S.C. § 465 ..... *passim*

25 U.S.C. § 479 ..... 4, 20
25 U.S.C. § 1701 2
25 U.S.C. § 1705(a)(2) 10
43 U.S.C. § 1715(c) 10

REGULATIONS

25 C.F.R. PART 151 19

INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the First Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property which may be taken into trust all over the United States.

The RISC Foundation, Inc., incorporated in the State of Rhode Island, is headquartered in Charlestown, where the lands to be taken into trust lie. It is the purpose of the foundation to identify and address significant issues affecting the quality of life in Rhode Island. Allowing the Narragansett Indian tribe to assert sovereignty over fee lands taken into trust pursuant to 25 U.S.C. § 465 will adversely affect all citizens of Rhode Island.

All parties have consented in writing to the filing of this Amicus Brief.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The first section of this brief analyzes the Rhode Island Indian Claims Settlement Act and explains how the Justice Department intentionally took decisions against the Western States and then applied them in the Eastern States to get even more expansive decisions. The second section discusses federal case law and how the "Indian trust" was used to create unlimited Secretarial discretion to benefit Indians. The last section explains how this Court can apply its prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to restrict the Indian Reorganization Act (IRA) as Congress intended.

ARGUMENT

The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. § 1701, *et seq.*, settled two lawsuits asserting aboriginal title claims of the Narragansett Indian Tribe in the Town of Charlestown, Rhode Island. These claims followed the pattern created by this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that allowed the Oneida Indian Nation to sue to reclaim aboriginal rights they claimed violated the Nonintercourse Act of 1790, 25 U.S.C. § 177. In *Oneida I*, the United States contended that it could and should apply cases decided in the Western United States in the Eastern States through the application of the Nonintercourse Act. By accepting the federal premise that federal Indian common law decisions for actual reservations of federal public domain land in the West were valid precedents to establish a sufficient federal claim arising under the laws of the United States in the

East, the federal reserved rights doctrine was made enforceable through the Indian Commerce Clause against the original thirteen colonies in *Oneida I*. The Western decisions were a combination of Property Clause, Treaty Clause and Indian Commerce Clause authorities decided on the basis of territorial rights being reserved to the United States before statehood. In one misguided decision, all forms of Indian occupancy rights became indistinguishable between East and West even though the United States never had any reserved rights against the Eastern states.

Admittedly, this Court in the *City of Sherrill* ruling, by applying the doctrine of laches to *Oneida I* has attempted to limit the mischief caused by this error in judicial review. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it expressly did not overrule *Oneida I*.

This brief explains why Section 5 of the IRA, 25 U.S.C. § 465, as Congress intended, must be confined to reservations of federal public domain lands that have never been subject to state jurisdiction. Under this standard, the Narragansett Tribe is not eligible to have lands placed into trust status under 25 U.S.C. § 465.

I. THE INDIAN REORGANIZATION ACT IS A PUBLIC LAND LAW

A. The Settlement Act Did Not Create A Federal Indian Reservation In Rhode Island

Sections 1705(a) and 1712(a) of the Settlement Act are very straightforward, they extinguish any and all aboriginal claims of the Narragansett Tribe in

Rhode Island upon acceptance of the lands purchased and transferred under the settlement and at any other location in Rhode Island. It is uncontested the Settlement Act was executed and that the Tribe's Indian title and Nonintercourse Act claims are extinguished. As the Rhode Island parties have argued, this case is about the authority of the Secretary of Interior to place additional lands purchased by the Tribe into trust for the Narragansett Tribe through 25 U.S.C. § 465 without a subsequent act of Congress. The Secretary asserts unlimited authority to take any lands purchased by any Indian tribe into trust status. The Secretary and United States assert that the Settlement Act does not apply to limit Secretarial authority to accept additional lands into trust status for the Narragansetts. The question of whether the Secretary has authority to accept fee lands purchased by or for the tribe into trust depends on the intent of Congress in enacting the Indian Reorganization Act (IRA).

The Petition for Certiorari addresses this question through interpreting the phrase "now recognized" in the IRA, 25 U.S.C. § 479. This brief incorporates that reasoning and adds to it by including the contemporaneous writings of Commissioner of Indian Affairs John Collier, the primary author of the bill that became the IRA. The MEMORANDUM FOR THE PRESS, (PRESS MEMO, p.1c-6c) outlines the "sweeping bill" introduced by Representative Edgar Howard of Nebraska. This Memo and two other Collier documents attached to this brief make it very clear that all Indians and Indian Tribes were either considered "landless" or were physically located on lands subject to the federal public land laws of the United States as required by Section 479. This bill was intended to create separate tribal municipal governments and

claimed the authority in the United States Congress to do this. There is only one clause of the Constitution that contains authority for the federal government to establish local governments: the Property Clause, Art. IV, Sec. 3, Cl. 2.

The Property Clause expressly sets the authority of the Congress to acquire new territorial lands of the United States and to establish local governments to prepare the people in those areas for citizenship. As this initial PRESS MEMO makes absolutely clear, this was the exact purpose of the bill introduced on February 12, 1934 that eventually became the IRA. (p.1c, 3c). Therefore, this bill applied directly to Indians and Indian tribes located on federal reserved public domain lands that still held their territorial land status. See First Circuit Decision, Comments of John Collier regarding 25 U.S.C. § 479, App. 23-4, 27. The purpose of the Wheeler-Howard Bill was to end the allotment practices of the Dawes Act and make territorial tribal governments that would govern the lands held by the United States for them. It was intended to be "along the lines of the subsistence homestead projects now being developed by the government for white communities." (p.2c) This irrefutable fact that the IRA was intended to apply only to Indians and Indian tribes located on federal public domain territorial lands, if overlooked by the federal courts, allows the Secretary to expand the IRA beyond its constitutional limits. In addition, it violates the separation of powers because the Property Clause is exclusively Congressional authority.

In the original thirteen colonies there never has been any federal territory or federal public domain land. For example, as a matter of federal law, the Seneca lands in the State of New York never left state

jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925). The federal courts as a matter of federal Indian common law interpreted conflict zones as "Indian country." "Indian country" developed as a sort of hybrid between federal enclaves and temporary federal territory. The Constitution only contains two clauses that address federal land ownership and control requiring the federal courts to create temporary federal common law designations. Acknowledging a temporary status because of an Indian uprising did not change the underlying land classification.

The State of Rhode Island made a permanent cession for an express federal purpose to provide land for the Narragansett Tribe in the Settlement Act. The land encompassed in the Settlement Act is like a federal enclave except that Congress reserved specific jurisdictional rights for the State. It is not reserved federal public domain territorial land or lands under temporary military jurisdiction to suppress a tribal uprising. More importantly, due to the extinguishment of aboriginal title no lands can be characterized as federal territorial land unless this Court is willing to apply the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) today. This is not an exaggeration. Even the PRESS MEMO quoting Commissioner Collier says "It [this bill] seeks to give to the Indians the simple right -- the inalienable right of all men who are not slaves -- of establishing an elementary form of self-government, organizing for collective action, and taking part in the management of their own affairs." (p.1c) The *Dred Scott* decision is most remembered for its positions on slavery. What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh

statements that Negro persons could never become citizens. *Id.* at 404, 420. This Court using its equity jurisdiction has preserved the *Dred Scott* decision as part of federal Indian common law.

Allowing the Secretary of the Interior to characterize any fee lands of the Narragansett Tribe, as a federal Indian reservation allows unlimited territorial authority as defined in *Dred Scott* to apply to the people and State of Rhode Island. The Part 151 regulations first adopted by the Secretary in 1980 in claiming to apply Section 5 of the IRA, 25 U.S.C. § 465, to "Indian reservations" converted the IRA from a federal public lands statute that only applied to increasing or using the land base of reserved federal land reservations in the West to all types of land still occupied by Indians, including state reservations in the East. As explained by Amicus CERF in its amicus brief for the *Sherrill* case, all federal Indian common law was based on this territorial war power. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf. By reinterpreting the word "reservation" in the IRA to apply to any lands occupied by Indians whether the land was reserved federal public domain land or not, all land in the United States is conquered territory ceded by some Indian tribe or still subject to Indian occupancy.

B. Taking fee lands into federal ownership creates federal public land.

The PRESS MEMO says that landless Indians were going to be assisted through the Wheeler-Howard Bill "through various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership..."(p.2c). It

was in the congressional discussion of these "various devices" that the expansive vision of Commissioner Collier was expressly limited by Congress. One of these "devices" was the idea of the Indians purchasing their own lands or having other persons or entities purchase lands for them that could then be added to or create new Indian reservations. This fee to trust device was originally in Section 5 of the IRA. The BULLETIN of the Mission Indian Agency of April 16, 1934 (BULLETIN, p.7c-12c) in Paragraph 10 states:

> "The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members."

(underline added)(p.11c).

This BULLETIN was released almost three months before the IRA bill was passed by Congress. The device we now call "fee to trust" in the original bill was expressly removed by Congress before it passed the IRA. Therefore, as passed by Congress, the only way to add additional lands under Section 5 of the IRA, 25 U.S.C. § 465, is for Congress to make a specific appropriation to purchase lands.

Congress did not intend to alter the nature of the Indian trust when it adopted the IRA. Under both the Dawes Act and IRA the Indian trust was based on the trust corpus of the Indian right of occupancy or Indian title. (p.9c) Payments for ceded lands and the remaining unceded lands were deemed to be in trust to protect the lands from alienation and taxation. The IRA altered

these individual land rights by extending the trust period indefinitely and by requiring tribal members to exchange trust patent allotments rather than to sell the allotments to non-Indians. This is exactly what this Court concluded in *United States v. John*, 437 U.S. 634, 645-46, 650 (1978).

When the IRA is viewed properly in its public lands context, the act of the Secretary accepting additional lands for the Narragansett Tribe pursuant to 25 U.S. C. § 465 is a subsequent land transfer. The Settlement Act does not authorize additional land purchases or transfers. As said in the concurrence by Justices Rehnquist and Powell in *Oneida I*:

> "The majority today finds this strict rule (mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case) inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the original grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." (parentheses and emphasis added).

Id. at 684.

It is a subsequent land transfer because it literally conveys land specifically not included in the Settlement Lands from state to federal ownership in trust for the Narragansett Tribe twenty years after specific land parcels were selected and transferred under the express terms of the Settlement Act. The parcels selected under the Settlement Act were a final selection. The transfer extinguished all tribal aboriginal claims. See 25 U.S.C. § 1705(a)(2) and § 1712(a)(2). As a matter of federal public land law, this transfer was the only federal acquisition allowed by the Settlement Act. To hold otherwise, destroys the intent of Congress in protecting the sovereign interests of the State of Rhode Island to maintain state jurisdiction over the transferred land. See 43 U.S.C. § 1715(c). The State of Rhode Island did not consent to any further lands being transferred to federal ownership under the Settlement Act. As the First Circuit concludes, the Secretary is asserting a federal Indian trust responsibility beyond that delegated in the Settlement Act. The Secretary claims this authority pursuant to Section 5 of the IRA. App. 38-49.

II. THE EXPANSION OF THE INDIAN TRUST

How the IRA was put into affect by Commissioner Collier is crucial to understand the profound impacts resulting even decades later. In 1937, Senator Wheeler attempted to repeal the IRA. In reaction, Collier released a Statement to the Associated Press (AP MEMO, p. 13c-16c) justifying his implementation of the IRA. Collier believed "that the powers vested in Indian tribes through their

constitutions may be not only those specified powers named in the Act but 'in addition, all powers vested in any tribe or tribal council by existing law.'" (p.14c)

The IRA was written to take full advantage of the federal Indian common law trust relationship. As the PRESS MEMO states:

> "The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as founder and director of the Indian Defense Association." (p.5c)

Collier intended the IRA to use the Indian trust to invoke the paramount sovereign authority of the United States. Although Congress struck out the most blatant parts of Collier's plan including the federal court for Indian claims and fee to trust, his fundamental goal was nevertheless met when this Court decided *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).

A. The Indian Trust Under the IRA

In the *Santa Fe* case, the United States asserted the right of the Walapai Tribe to all the lands it had occupied in 1866 within and without its present reservation. This claim was for all of the aboriginal lands ever occupied by the Walapai Tribe. The claim

was based on the adoption of the Trade and Intercourse Acts for the Territory of Arizona in 1851 which preceded the grant of public land to the railroad. The United States argued that their policy placing the Indian trust relationship ahead of other interests was established through the application of the Trade and Intercourse Acts. *Id.* at 347. This policy was clearly not based on making a specific reservation for the Walapai Tribe. The argument made in *Santa Fe* is that the Indian country territory of the Walapai Tribe was a separate federal territory merely because the Indians occupied the area. This follows the federal common law separate Indian territory position of the *Dred Scott* decision.

In *Dred Scott,* Chief Justice Taney separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other."

Scott at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial

> communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it."

Id. at 403-4.

Chief Justice Taney's assumptions were utterly untrue. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State before the Constitution was in effect. *See Sherrill* at 203. In the West, many Indians had been enslaved under Mexican rule before the United States won the Mexican-American War. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories outside of the Northwest Territory was unlimited by any act of Congress or any clause of the Constitution. *Id.* at 432. This rewriting of the

Constitution was done to prevent the Negro race from ever becoming state or national citizens. But the comparing and contrasting of the Indian rights by which it was accomplished in the *Dred Scott* majority opinion turned the protective Indian trust relationship of the Marshall trilogy into an unlimited federal weapon asserting the "political relationship" with an Indian tribe to challenge the right to self-government. All the Executive branch has to do is reclassify an area as "Indian country" to apply the separate unlimited territorial power. Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign People. *See Elk v. Wilkins*, 112 U.S. 94 (1884). Therefore, the Indian trust is whatever the federal government decides it is without any Constitutional constraints if the *Dred Scott* opinion remains part of federal Indian common law.

After the passage of the IRA, there was no reason to restrict the claims of the United States on behalf of Indian tribes to federal lands actually reserved for their use. According to Collier, any tribal interest could be asserted against any interest at any time because the Congress had just made the recognized Indian tribes separate territorial governments with direct powers of self-government. Under Collier's view this was only a temporary status until the Indians were able to become parts of white society. Collier acknowledged the Indian Naturalization Act of 1924 and did nothing to impair the constitutional rights of Native Americans. BULLETIN p. 8c-9c. His IRA was an early type of affirmative action program. PRESS MEMO p. 1c-6c. But instead of using Section 5 of the 14th Amendment as later established through the

Civil Rights Movement of the 1950's, his program relied on attempting to convert the reasoning of the majority opinion in *Dred Scott* into promoting tribal sovereignty and Indian self-determination to help the Indians pull themselves out of poverty.

Within a very short time of its passage, the roots of the IRA became apparent in cases like *Santa Fe* and Congress balked at providing funding to promote its expansive goals. See AP Memo, p.13c-16c. When this Court limited the IRA and the Secretarial expansion of the Indian trust in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) by placing the federal Indian trust lands within the overriding context of the equal application of the law, only a very small amount of land was purchased for Indians by Congress under Sec. 5 of the IRA. Besides assigning more marginal federal public domain lands to Indian reservations, the IRA had very little impact after 1948. By the mid-1950's Congress was back to terminating tribal status and selling Indian lands.

B. The Era of Unlimited Indian Trust Authority

The IRA languished until the American Indian Movement began in the mid-1960's. With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the unlimited territorial power permanent through preservation of tribal sovereignty. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to

Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. And this Court began issuing opinions unleashing this "Indian trust" power on the States and people. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility." This Court then directly allowed the Nixon Administration to reinterpret the IRA. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This decision let the Nixon administration and all subsequent administrations reinterpret the "political relationships" that existed only on real federal Indian reservations of public domain land under Section 479 of the IRA to being any recognized "political relationship" the Secretary or President recognized at any time. Through federal Indian common law in the 1970's, this Court unleashed the twisted reasoning of *Dred Scott* at the States, local communities and every individual. This massive expansion of the Indian trust was applied to 25 U.S.C. § 465, to achieve the fee to trust power that Congress had expressly removed from the IRA in 1934.

For the Indian trust to become unlimited the federal courts had to assume that the Secretary could interpret the IRA and 25 U.S.C. § 465 to apply to any land classification, just as the First Circuit did in this case. App. 30-31. In *Stevens v. Commissioner of the Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), a Gros Ventre tribal member with trust patent allotments exchanged his lands through the Bureau of Indian Affairs for other allotted lands. The Commissioner

claimed the individual Indian owed back federal taxes on the income gained on the exchange of the lands because they were not of equal value and did not qualify as being tax exempt. The case turned on the discretion of the Secretary of the Interior to accept the trust patent lands and exchange them for other individual allotment lands already held in trust by the United States. The Secretary argued that the exchange of lands was made pursuant to 25 U.S.C. § 465.

In *Stevens*, the Ninth Circuit concluded that all of the Indian statutes should be construed in *pari materia* as evidencing one continuous federal Indian policy to allow this exchange of allotted lands to be tax exempt pursuant to 25 U.S.C. § 465. *Stevens* at 746-8. In the conclusion of the *Stevens* case the Ninth Circuit opined:

> "Bearing in mind that "doubtful expressions are to be resolved" in favor of the Indians (*Squire v. Capoeman, supra*) and giving weight to the interpretation of the various acts by Interior, we conclude that the Secretary of the Interior has the discretionary power under the Indian Reorganization Act to purchase land for Indians with funds supplied by them and when lands are so purchased they are subject to the implied exemption from income taxation contained in the General Allotment Act." *Stevens* at 749.

Exchanging individual Indian trust allotments for other individual Indian trust allotments to preserve their tax exempt status was certainly within the intent of Congress in adopting the IRA in 1934. Section 4 was the provision to restore "surplus lands" contained within historical reservation boundaries. Section 4 of

the IRA delegated the Secretary discretion to restore or exchange allotted lands within historical territorial reservation boundaries that maintained a reserved right in the United States under the Property Clause for the protection of Indians. Section 4 of the IRA was codified in 25 U.S.C. § 463 - § 464. Section 4 of the IRA specifically allows the exchange of untaxed allotted lands still restricted from alienation to be exchanged for different untaxed allotments as done in *Stevens*. Instead, in *Stevens* the Secretary claimed the tax exempt status for the exchanged allotted lands was 25 U.S.C. § 465. The Nixon administration intentionally misconstrued the IRA in the *Stevens* case. The federal attorneys for the Secretary of Interior could rely on the fact that the federal attorneys for the defendant Commissioner were not going to question the statutory construction of the IRA made by the Secretary. This allowed the BIA to falsely represent that the exchange of Indian allotted lands was made pursuant to 25 U.S.C. § 465 when the correct provision of the IRA was 25 U.S.C. § 464.

The Ninth Circuit's erroneous language in the conclusion of *Stevens* regarding 25 U.S.C. § 465 was almost immediately used in Washington State to acquire lands within the "historical boundaries of the Puyallup reservation" situated within the City of Tacoma into trust status. *City of Tacoma v. Andrus*, 457 F.Supp 342 (D.D.C. 1978). As in *Stevens*, these lands were also subject to acquisition pursuant to Section 4 of the IRA. Section 4 of the IRA, 25 U.S.C. § 463, specifically addresses the rights of non-Indians located within historic reservation boundaries and balances their interests to the asserted need to reacquire lands for Indians. By intentionally misapplying 25 U.S.C. § 465 to a type of land acquisition

specifically addressed in 25 U.S.C. § 463, all of the safeguards incorporated in the IRA for non-Indians are removed from the Secretary's determination of whether to acquire the additional land for individual Indians or tribes. The *City of Tacoma* case explains how the overbroad language of *Stevens* becomes the basis of the first fee to trust regulations promulgated by the Secretary of the Interior in 1978. *Id.* at 345-6.

Immediately following the *City of Tacoma* decision, the Secretary took lands into trust in the City of Sault Ste. Marie, Michigan. The City sued to stop the fee lands purchased by the tribe that were not situated within historic reservation boundaries from being placed into trust status. However, the City was not considered a person that could raise due process claims. *City of Sault Ste. Marie v. Andrus*, 532 F.Supp 157, 167-8 (D.D.C. 1980). This left the City with standing but no enforceable right against this assumed fee to trust power of the Secretary asserted under Section 5 of the IRA, codified as 25 U.S.C. § 465. Because of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) that removed the Fourteenth Amendment defense that naturally went against this inequity, there was no means to argue against the asserted Secretarial authority.

The decisions in *Stevens*, *City of Tacoma* and *City of Sault Ste. Marie* are the basis of the fee to trust regulations, 25 C.F.R. Part 151, promulgated pursuant to Section 5 of the IRA, 25 U.S.C § 465. These cases found that 25 U.S.C. § 465 does not encompass interests considered to be within the "zone of interests" for prudential standing for any non-Indian opposing a fee to trust application. The Secretary makes fee to trust decisions only for the Indian tribes because they are Indians and separate territorial governments. This

decision making process rests on the intentional misapplication of the IRA as explained above. It is important to note that the *Sault Ste. Marie* case is cited by the First Circuit as the basis that these Petitioners have no right to question the Secretary's authority under 25 U.S.C. § 465 to place these lands into trust for the Narragansett Tribe. App. 33-34.

Under the Nixon Indian Policy the Indian trust is unlimited. It encompassed any and all federal programs or federal functions that can be delegated to an Indian tribe, including the decision to place additional lands for Indians into trust status under 25 U.S.C. § 465. On January 4, 2008, Assistant Secretary Carl J. Artman, limited the policy of acquiring "off reservation" fee lands into trust status. *See* http://www.indianz.com/News/2008/006483.asp. The Secretary has for the first time since 1970 interpreted the IRA as imposing a limitation on Secretarial discretion. However, this concession falls far short of limiting the IRA to only Indians and Indian tribes on actual federal Indian reservations as required by 25 U.S.C. § 479.

III. LIMITING FEE TO TRUST ENDS THE UNLIMITED TERRITORIAL AUTHORITY

It needs to be made clear that proposing to end the unlimited territorial authority of the Nixon Indian Policy does not terminate the Indian trust relationship. All Amici RISC and CERF are proposing to end is the application of the territorial power to lands under state jurisdiction. By addressing the fee to trust issues in this case, this Court can conclude that the IRA does not apply to Indians or Indian tribes that were not recognized or did not have reserved federal public

domain lands in June 1934, unless specifically recognized and given lands by Congress. In other words, interpret the IRA as Congress intended -- a federal public land law to correct the Dawes Act. Lands purchased by Congress by special act as for the Narragansett Tribe or using the express terms of Section 5 of the IRA for the Mississippi Choctaw would be unaffected by such a ruling. Such a ruling would terminate the threat of the Executive Branch being able to recreate federal territorial land anywhere in the United States.

This Court has already asserted its judicial review authority to rebalance the federal common law equities in *Sherrill*. *Sherrill* at 218-20. By correctly interpreting the IRA as a federal public lands statute, this Court can rule that Sec. 5 of the IRA, 25 U.S.C. § 465, cannot be applied in Rhode Island to end the unlimited territorial power assumed by the Secretary of the Interior. The Petitioners have continuously argued that the Settlement Act prevents these 31 acres from being placed into "trust" to create sovereign Indian land in Rhode Island. By applying the rebalancing of the equities from the *Sherrill* decision as a limitation on the discretion of the Secretary to acquire additional lands for Indians, this Court can place the Indian trust back within the equal protection of the laws.

This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to recreate tribal sovereignty. *Id.* at 213-4. Fee to trust is just another version of the same "unification theory" that purportedly allows tribally purchased or owned fee lands to become Indian territory by having their title transferred to the United States pursuant to 25 U.S.C.

§ 465. This transfer to federal ownership in "trust" by the Secretary of Interior is supposed to restore tribal sovereignty rights as if they were never extinguished over the accepted land. Congress expressly removed any authority in the IRA for the Secretary to accept tribally purchased or individually obtained fee lands outside of existing Indian reservation boundaries into trust status pursuant to Section 5 of the IRA. Congress did not expand the federal reserved rights doctrine in the IRA. This Court can correct the Secretary's assumption of fee to trust authority in this case by interpreting the IRA as Congress intended.

This Court finally applied the equal protection clause of the Fourteenth Amendment to overrule *Dred Scott* in *Saenz v. Roe*, 526 U.S. 489, 502 Fn. 15 (1999). Removing land from state jurisdiction by placing fee lands into federal trust for one group of state residents because they are recognized as "Indians" completely removes the political process rights of all other state residents. Removing the state political process rights of the non-Indian people nullifies their exercise of local self-governance. Local self-governance is the political sovereignty to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959). This was the reason Congress limited the application of Section 5 of the IRA to only those lands reserved before statehood in the Western states or lands expressly purchased by Congress for Indian tribes. On reserved public lands, the rights of state and local self-government have never completely vested. Congress certainly did not delegate to the Secretary of the Interior in the IRA the unlimited weapon of recreating Indian territory as defined in *Dred Scott* to remove state and individual sovereignty where it is vested. All of the reasons this Court refused to rekindle the long

dead embers of the tribal sovereignty of the Oneida Indian Nation apply to this case and all other fee to trust cases.

CONCLUSION

The Court should accept the petition for certiorari and reverse the decision of the First Circuit.

Respectfully submitted,
Bruce N. Goodsell
Counsel of Record
16 High Street
Westerly, RI 02891
(401) 596-1948

DEPARTMENT OF THE INTERIOR

MEMORANDUM FOR THE PRESS

FOR RELEASE IN AFTERNOON PAPERS OF Tuesday, February 13. 1934.

Washington, D.C., February 13. A sweeping bill, drafted in the Office of Indian Affairs and the Office of the Solicitor of the Interior Department, for the economic rehabilitation of the Indians and for Indian self-government, was introduced in the House of Representatives today by Rep. Edgar Howard of Nebraska. The bill is aimed primarily at stopping the rapid draining of Indian lands and other natural resources into white ownership through the allotment system, and at curbing the hitherto almost autocratic powers of the Office of Indian Affairs over the persons, property, and institutions of the Indians by granting to them the elementary powers of self-government.

"This 'bill of Indian rights', Commissioner Collier stated today, "is the most far-reaching measure of legislation in the whole history of our dealings with the Indians. It is not radical legislation: on the contrary it is conservative. It seeks first of all to stop the shocking waste of Indian lands and natural resources which the government has permitted and encouraged for more than half a century. It seeks to give to the Indians the simple right - - the inalienable right of all men who are not slaves – of establishing an elementary form of self-government, organizing for collective action, and taking part in the manage-ment of their own affairs, This bill thus strikes a double blow at the two fatal weaknesses of Indian administration across a whole century: first,

the dissipation of the Indian estate and the progressive pauperization of the Indians, and second, the suppression of Indian tribal and social and religious institutions and the steadfast failure of the Government to organize any effective plan of collective action by which the Indians could advance in citizenship and protect their rights."

"The allotment system has been disastrous to the Indians," Collier continued "because it has taken away from them the only means of self-support which most of them are equipped to use, namely, the land. The allotment act of 1887 is largely responsible for the existence of one hundred thousand landless Indians, most of whom are paupers."

In the economic field, the bill proposes to repeal the allotment law of 1887, through which the Indians have lost two-thirds of their lands to the whites, to prevent any further alienation of Indian lands outside of Indian ownership, to put allotted lands, especially grazing and forest lands, back into community ownership, to prevent overgrazing, to place the Indian forests, of which there are eight million acres, on the basis of continuous productive forestry management, and to develop Indian farming, livestock raising, and other land use along the lines of the subsistence homestead projects now being developed by the government for white communities. While the bill provides various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership, it carefully safeguards the vested rights of Indian allottees and heirs.

As pointed out by Commissioner Collier, the white man's system of fee patent ownership has not worked with the Indians, for the reason that most of them, once they received title to their allotments, could not resist the temptation to sell it to a white man for a little ready cash.

In the field of self-government, the bill proposes to curb the hitherto autocratic powers of the Office of Indian Affairs over the Indians and to substitute in its place a cooperative and advisory relationship. In addition, the bill, in conjunction with the Johnson-O'Malley bill previously introduced, provides a definite system of financial cooperation between the Federal Government and the states whereby many function of health, education, and other Indian services may be taken over by state or local communities, the cost to be reimbursed by the Federal Government. Under the proposed plan of Indian self-government, Indian municipal corporations will be chartered by the Secretary of the Interior, subject to ratification by the Indian community, and those corporations will be endowed with the powers which, in the opinion of the Secretary of the Interior, they are competent to discharge. The bill proposes a progressive and experimental delegation of powers, including police power, public health, establishment of Indian courts, the management of Indian community property, and such other powers as local government ordinarily embraces.

Many of the local functions of the Indian Service may, under the proposed bill, be transferred to the Indian community and carried on by qualified Indian employees: but the Secretary of the Interior is directed

to enforce suitable standards of fitness for such Indian employees.

Moreover, the Indian community may appoint a qualified Indian to any vacancy in the Indian Service if such candidate is found to possess the necessary qualifications.

Indian communities would henceforth, under the terms of the bill, take formal part in preparing budget estimates and making recommendations to Congress for appropriations to assist the communities, and the future expenditure of appropriations covering services transferred to the Indian community would be by its bonded Disbursing Officer, subject to the laws of the United States.

The Indian Service would continue to administer all functions not transferred to the community, would assist the community in developing its self-government, and would require the observance of the charter, protect the rights of minorities, and assure the effective conduct of the community government. Functions which prove not to be efficiently conducted by the community may be retransferred to the Indian Service.

In order to equip the Indians to take over increasing powers of self-government. and business management, the bill sets up a program of educating Indians as administrators, judges, public health officials, foresters, grazing experts, engineers, nurses, accountants, and experts in other fields.

A novel feature of the bill is the provision for compulsory transfer of unsatisfactory local officials of

the Indian Service on charges brought by the Indian community, under rules and regulations by the Secretary of the interior to prevent abuse of this power.

The bill also provides for the creations of a United States Court of Indian Affairs, consisting of seven judges appointed by the President, to have jurisdiction over all cases involving federal crimes committed in Indian reservations, cases to which an Indian tribe or community is a party, and other cases growing out of relations between Indians and whites or out of property rights of Indians. It also provides ten special federal attorneys to assist and advise Indian communities in matters of law and equity.

The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as founder and director of the Indian Defense Association.

"This legislation is important to the Indians," Commissioner Collier said, "because for the first time it gives them a chance to achieve economic and social security, to shake off the deadening clutch of irresponsible bureaucratic domination, and to achieve the freedom and dignity which their history and qualities entitle them to. It is important to the whole country because it offers an opportunity to clean house in the long maladministration of Indian Affairs and to

save vast sums of public money by setting the Indians at last on the road to self support.

"We have no illusions," Collier continued. "about the difficulty of the task ahead. But we know that the Indians all over the country have awakened and are thinking as they have never thought before. We know too that Indian Welfare Associations and individuals who have given years of study to the Indian problem strongly support the two great purposes of this bill. From long years of direct experience with the Indians I personally know that they are capable of working out economic independence, of fulfilling the civic responsibilities of American citizens, and of preserving their own distinctive culture and tradition while taking a rightful place in the midst of a white civilization. They have never had a chance to do those things. This bill gives them the chance."

(P.N. 81316)

BULLETIN

MISSION INDIAN AGENCY,
Riverside, California,
April 16, 1934

THE WHEELER-HOWARD BILL - QUESTIONS AND ANSWERS

1. Q. Will the Wheeler-Howard bill take lands away from Indians who have kept their allotments and divide it up among those Indians who have no land?

A, No. land for landless Indians will be purchased out of Federal appropriations totaling two million dollars per year authorized by title 2, section 7, of the bill, and also, if any tribe so desires, out of tribal funds. Any Indian who now owns land can keep what he has, or sell part of it to the tribe if he wishes. The provision now contained in title 3, section 8, paragraph 2, allowing the Secretary of the Interior to sell individual allotments to a tribe or community is to be amended so that such sale can take place only with the consent of the individual allottee.

2. Q. Will the Wheeler-Howard bill destroy the right of an Indian's heirs to inherit land?

A. No. on the contrary, it is the allotment system and the inheritance laws of the past which have prevented a hundred thousand Indians, now landless, from inheriting a single acre of the land which their fathers owned. Under the Wheeler-Howard bill heirship lands will no longer be sold to whites.

Where they cannot be economically divided among the Indian heirs they will be consolidated in large tracts and each heir will have his proper share in the use and rental of these tracts, his share evidenced by a corporate certificate. Improved lands, however, will not be consolidated, and the individual ownership will be undisturbed. The transfer of title to the tribe or community which is provided for in section 11 of title 3 simply prevents the sale of the land to outsiders.

It does not abridge any Indian's right of possession any more than does the retention of legal title by the United States Government.

3. Q. Does the Wheeler-Howard bill prejudice any treaty rights or claims against the Government?

A. No. Its only effect on treaty rights or claims is to insure (through section 6 of title 1) that any funds collected by a chartered Indian community can no longer be spent by the Federal Government without the consent of the tribe, as has been done with moneys recovered under treaty claims in the past.

4. Q Does the Wheeler-Howard bill attempt to send the Indian"back to the blanket?"

A. No. The bill helps the Indian to make real progress in securing for himself the greatest benefits of the white man's civilization, increased education, efficient democratic government, sound business organization, and a higher standard of living.

5. Q. Does self-government mean the segregation of the Indian?

A. No. the Indian member of a chartered community retains all rights of American citizenship, including the right to vote in Federal and State elections. Participation in an Indian community would not interfere with religious, educational, business or personal relationships outside the community any more than would a white man's participation in a village, a club, or a corporation cut him off from such religious, educational, business or personal relationships.

6. Q. Will this bill end Federal guardianship of Indians?

A. This bill specifically provides, in section 11 of title 1, that Federal guardianship of Indians and tax exemption of Indian lands shall be continued. It does offer a way in which Indians may, if they wish, bring an end to objectionable features of the present Federal guardianship by gradually assuming local control over matters which the Indian Office now handles.

7. Q. How would a chartered Indian community be able to pay its employees?

A. Where such employees perform tasks similar to those now performed by Federal employees, it is contemplated that present Federal appropriations will be continued, with only this difference: They will be paid to the Indian community instead of the Indian Office. Where employees of a chartered Indian community perform now jobs, such as the promulgation of local ordinances or the management of cooperative marketing, the Indian community will have to pay those employees out of its own income. This bill seeks to increase that income by making credit facilities

available to chartered communities, by increasing Indian lands, by giving Indian communities control over tribal funds and Federal property on the reservations, and by making it possible for such communities to engage in business and trade on an efficient and profitable basis.

8. Q. How will this bill affect the Indian who has retained his trust allotment?

A. This bill will protect the trust patent Indian by taking away the power of the Secretary over to grant a fee patent rendering the land taxable and alienable. The trust patent Indian can continue to possess any land he now possesses, but if he prefers he can cast his land into a larger unit and receive a share in the ownership of the whole unit, which would be profitable to all concerned, in the case of most grazing and timber lands. Not only will his possession of land continue, but the bill will make available proper credit facilities for improving and using the land, which he is now often forced to rent to outsiders for an inadequate rental. Moreover, the bill will offer him the legal protection he needs to secure, redress against trespassers and lessees who default in rentals. When he dies, his heirs will inherit special rights to his trust patent land, but the title will be placed in the tribe or community so that his heirs may not lose the land.

Where the land cannot be economically used by the various heirs, it will be put into large units, and the heirs will receive their proper shares in these units.

9. Q. How will this bill effect the Indian who retains fee patent land?

A. the Indian who has fee patent land, like the Indian with trust patent land, is under no compulsion to sell the land to an Indian tribe or community. He may, if he desires, if the Secretary of the Interior agrees, and if the land is unencumbered, surrender his fee patent and receive in exchange a trust patent under which his land will not be alienable or taxable, or a proportionate interest in such restricted land.

10. Q. How will this bill affect the Indian who has no land, or only a small amount of land?

A. The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members. Part of the loan fund of five or ten million dollars provided by section 13 of title 1 of the bill, as amended, will be available for improving these lands.

11. Q. How much time can the Indians take to decide whether or not to accept the self-government features of the bill?

A. If the bill is passed, each Indian tribe or community can take as much time as it wants to decide whether to accept self-government. Under the terms of the bill no charter can be forced on a group of Indians that does not want a charter.

Each group of Indians can consider the question at its leisure, with the help of private attorneys or officials of the Indian Department, before deciding

whether a program of self-government will be advantageous to the group and what kind of program it wishes. On the other hand, if the bill is not passed, Indian tribes will not be able to secure self-government if they desire it, because the Secretary of the Interior will not have the power to issue a charter of self-government.

12. Q. What can the Indians do to help or hinder the passage of the Wheeler-Howard bill or to secure changes in it?

A. Indians who want to see this bill passed should write to their Congressmen and Senators or to the sponsors of the bill, Congressman Howard and Senator Wheeler, or to the Commissioner of Indian Affairs, stating their opinion of the bill. Indians who object to the passage of the bill may help to defeat it by sending their objections to those individuals – or by keeping silent while the white opponents of the bill attack it.

Indians who object to certain part of the bill should work out suitable amendments and forward them to any of the individuals named above, giving the reasons for the proposed amendments.

131778

STATEMENT BY COMMISSIONER JOHN COLLIER, OF THE OFFICE OF INDIAN AFFAIRS TO THE ASSOCIATED PRESS, ON THE ATTEMPTED DESTRUCTION OF THE INDIAN REORGANIZATION ACT BY SENATE BILL 1736

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Washington, D. C.

March 3, 1937

Senators Wheeler and Frazier have been good friends to the Indians and their cause. For this reason, their action in sponsoring an attempt to repeal the Indian Reorganization Act is mystifying. Their reasons, as reported by the Associated Press, are even more mystifying.

Neither of them has a word to say about the main positive features of the Act, which both of them voted to make into law. The Act stops the further wastage of Indian lands through allotment. It sets up an agricultural credit system for Indians. It gives Indians a preference in government employment. It establishes opportunities for advanced education for Indians. It requires protection of their lands against destructive uses resulting in deforestation and soil erosion. It sets in motion a process of re-vesting the landless Indians with land on which they can subsist. These are only some of the main positive features of the Indian Reorganization Act which Senators Wheeler and Frazier propose to destroy.

The Associated Press, interviewing them, apparently obtained no statement from either one or the other as to any of these positive features of the Act, or of the accompanying Oklahoma Indian Welfare Act, whose enactments have brought a new era to about 80 percent of the Indians. Respecting the Oklahoma Indian Act, which carries to Oklahoma the main benefits of the Indian Reorganization Act, they have nothing to say and they do not seek its repeal. But if they are to be consistent, they will attempt likewise to repeal the Oklahoma Act.

Their reasons, as quoted by the Associated Press, are partly irrelevant and partly inaccurate.

Senator Wheeler is quoted as objecting that features stricken from the original Wheeler-Howard Bill are nevertheless being put into effect by the Secretary of the Interior through constitutions granted to the tribes which have organized under the Act. But the Act expressly states that the powers vested in Indian tribes through their constitutions may be not only those specified powers named in the Act but "in addition, all powers vested in any Indian tribe or tribal council by existing law." The "existing law," as it stood before the Indian Reorganization Act was signed, gave to the Department certain powers to vest authority in tribes, and directly vested certain authorities in tribes. The Indian Reorganization Act extended these authorities and limited the authority of the Department. Why has it been wrong for the Secretary of the interior to obey the express language of the Indian Reorganization Act, and to vest the tribes with all those authorities given by prior acts as well as by the Reorganization Act?

Senator Frazier, as quoted by the Associated Press, voices a criticism which seem to be exactly the opposite of Senator Wheeler's. He is quoted as stating that a majority of the Indians have complained that instead of getting more self-government through the Act, they were getting less self-government. This could only mean that the constitutions granted to the tribes, instead of going beyond the scope of the Indian Reorganization Act in their grant of powers, as alleged by Senator Wheeler, have withheld from the tribes even those powers contained in the Reorganization Act. The allegation is not supported by the facts, nor is it accurate to state that the majority of the Indians, or even any substantial minority of them, have complained that they were being dictated to. Actually, out of 230 tribes, 170 adopted the Act by majority votes, and are subsisting under it; none of them has asked that it be repealed; and many of the tribes which voted not to accept the Act are now desirous of being permitted to vote once more upon it, in order to get its protections and benefits.

Senator Frazier makes another statement, as quoted, to the effect that Indians who did not accept the Reorganization Act have been discriminated against and specifically, have been punished by being removed from relief rolls. Senator Frazier states that there have been such complaints. He does not state that they are true. Such complaints, if made, are in fact grossly untrue.

The expenditure of emergency funds for Indian tribes has been carried out with no relation whatsoever to the Indian Reorganization Act., The expenditures of regular funds have been carried out as specifically

directed by congress. Tribes not under the Act have received in many instances greater quotas of the emergency moneys of all sorts than tribes under the act. Indian relief has been expended according to available funds, human need, and the opportunity to expend the funds usefully upon Indian-owned land.

Even were Senator Frazier's allegations, as quoted, supported by fact, they would provide no reason whatsoever for seeking repeal of the Indian Reorganization Act. There would be criticisms directed against administration, and correction logically would be sought through demanding administrative reforms.

The existence of the facts is denied. But if they did exist, they would furnish no justification for an attempt to destroy the Indian Reorganization Act with its grants for protection of Indian property, new land, credit, improved education, and all those other benefits which have made the Act the foundation of a new and more hopeful life among the Indians.

In my opinion there is no chance that the bill introduced by Senators Wheeler and Frazier will be passed by Congress or if passed, signed by the President

JOHN COLLIER

Commissioner of Indian Affairs.

JOINT APPENDIX

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No. 07-526

IN THE
Supreme Court of the United States

DONALD L. CARCIERI,
Governor of Rhode Island, ET AL.,
Petitioners,

v.

DIRK KEMPTHORNE,
Secretary of the Interior, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

Joint Appendix

THEODORE B. OLSON
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner
Donald L. Carcieri

Neil F.X. Kelly
Assistant Attorney General
Counsel of Record
150 South Main Street
Providence, RI 02903
(401) 274-4400

Counsel for Petitioner
State of Rhode Island

Gregory G. Garre
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel for Respondents

Joseph S. Larisa, Jr.
Assistant Solicitor for Indian Affairs
Counsel of Record
Town of Charlestown
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

Counsel for Petitioner
Town of Charlestown

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 18, 2007
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TABLE OF CONTENTS

Relevant Docket Entries in the United States Court of Appeals for the First Circuit, *Carcieri v. Norton*, No. 03-2647 ..... 1a

Relevant Docket Entries in the United States District Court for the District of Rhode Island, *Carcieri v. Norton*, No. 00-cv-00375-ML 17a

Letter from Asst. Comm'r E.B. Meritt, Office of Indian Affairs to Mr. John Noka (May 5, 1927) (Ex. 5 to Appellants' Joint Mem. of Law (1st Cir.)) 21a

Letter from Asst. Comm'r E.B. Meritt, Office of Indian Affairs to Mr. Daniel Sekater (June 29, 1927) (Ex. 5 to Appellants' Joint Mem. of Law (1st Cir.)) 22a

Letter from Comm'r, Office of Indian Affairs to Rep. John M. O'Connell (Mar. 18, 1937) (Ex. 5 to Appellants' Joint Mem. of Law (1st Cir.)) 23a

Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims (Feb. 28, 1978) (Ex. A to Plaintiffs' Joint Statement of Undisputed Facts) 25a

Deed Conveying Settlement Lands from the Narragansett Indian Tribe to the United States in Trust (Jan. 7, 1987) (Ex. C to Plaintiffs' Joint Statement of Undisputed Facts) 39a

Letter from Franklin Keel, Eastern Area Director, Office of Indian Affairs to The Hon. Matthew Thomas (Mar. 6, 1998) (Admin. Record Vol. 2, Tab O) 45a

Decision by the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals (June 29, 2000) (Admin. Record Vol. 4, Tab L) 48a

Order of the Supreme Court of the United States Granting Certiorari (Feb. 25, 2008) 72a

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the First Circuit (July 20, 2007) 1

Opinion of the United States District Court for the District of Maine (Sept. 29, 2003) 84

General Docket
United States Court of Appeals

Court of Appeals Docket #: 03-2647	**Docketed:** 12/08/2003
Nature of Suit: 2890 Other Statutory Actions	**Termed:** 07/20/2007
Carcieri, et al v. Norton, et al	
Appeal From: District Court of Rhode Island, Providence	

* * *

12/08/2003	CIVIL CASE docketed. Opening forms sent. Notice filed by Appellants Donald L. Carcieri, State of Rhode Island and Providence Plantations and Town of Charlestown Rhode Island. Appearance form due 12/22/03. Docketing Statement due 12/22/03. Transcript Report/Order due 12/22/03. [03-2647]
	* * *
02/13/2004	BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Providence Plantations and Town of Charlestown, Rhode Island. Length: 92 pages, 22,000 words. Copies: 10. Delivered by mail. Certificate of service date 2/6/04. [837256-1] Appellee brief due 3/15/04. Reply brief due 3/29/04. [03-2647]
	* * *

02/17/2004	BRIEF filed by Amicus Curiae States of Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, State of North Dakota, State of South Dakota, Utah and Vermont in support of Appellant State of Rhode Island. Length: 27 pages, 6,560 words. Copies: 10. Delivered by mail. Certificate of service date 2/13/04. [838201-1] [03-2647]
	* * *
04/14/2004	BRIEF filed by Appellees Franklin Keel and Gale A. Norton. Length: 62 pages, 13,700 words. Copies: 11. Delivered by mail. Certificate of service date 4/13/04. [857657-1] [03-2647].
	* * *
04/21/2004	BRIEF filed by Amicus Curiae Absentee Shawnee Tribe, Akiak Native Community, Cahto Tribe, Cheyenne River Sioux, Coeur d'Alene Tribe, Confederated Salish, Confederated Tribes, Eastern Pequot, Eastern Shawnee, Ely Shoshone Tribe, Fallon Paiute-Shosho, Ft. McDermitt Paiute, Grand Traverse Band, Inupiat Community, Kenaitze Indian, Kickapoo Tribe, Lac Courte Oreilles, Lovelock Paiute, Lummi Nation, Moapa Paiute Band, Curiae Modoc Tribe of OK, Narragansett Indian, Native Village, Nez Perce Tribe, Oneida Tribe, Prairie Band, Pueblo of Laguna, Pueblo of

	Santa Ana, Pueblo of Taos, Seminole Tribe of FL, Shoshone-Paiute, Sisseton-Wahpeton, St. Regis Mohawk, Suquamish Tribe, Tanana Chiefs, Te-Moak Tribe, Tuolumne Band, United South and Eastern, Washoe Tribe of NV, Yomba Shoshone Tribe and Oglala Sioux Tribe in support of appellees. Length: 31 pages, 6,942 words. Copies: 11. Delivered by mail. Certificate of service date 4/20/04. [860785-1] [03-2647]
	* * *
04/27/2004	BRIEF filed by Amicus Curiae The Mississippi Band of Choctaw Indians in support of appellees. Length: 25 pages, 6,546 words. Copies: 11. Delivered by mail. Certificate of date 4/26/04. [861742-1] [03-2647]
	* * *
05/04/2004	BRIEF filed by Amicus Curiae Natl Coalition Against Gambling Expansion in support of appellants. Length: 26 pages, 6,737 words. Copies: 11. Delivered by mail. Certificate of service date 4/5/04. [864628-1] [03-2647]
	* * *
05/26/2004	REPLY BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 72 pages, 16,700 words. Copies:

	11. Delivered by mail. Certificate of service date 5/20/04. [872082-1] [03-2647]
	* * *
09/17/2004	CASE ARGUED 09/17/04. Torruella, Howard, DiClerico, JJ.
	* * *
02/09/2005	OPINION filed by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. Signed by Judge Juan R. Torruella, Authoring Judge. PUBLISHED. [959195-1] [03-2647]
02/09/2005	JUDGMENT entered by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel. Upon consideration whereof, it is now ordered, adjudged and decreed as follows: The district court's grant of summary judgment in favor the Secretary is affirmed. [959198-1] [03-2647]
	* * *
03/29/2005	PETITION filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI for rehearing en banc. [976061-1]. Certificate of

	Service dated 3/25/05. [03-2647]
	* * *
05/26/2005	ORDER entered by Judge Juan R. Torruella, Judge Jeffrey R. Howard and Judge Joseph A. DiClerico. Pursuant to Fed. R. App. P. 35(e) and 1st Cir. R. 35(e), the Secretary of the Department of the Interior is directed to file a response to the state appellants' petition for rehearing en banc. This response shall not exceed 15 pages and shall be submitted no later than 20 days from the issuance of this order. The Secretary's brief shall address the state appellants' arguments concerning the application of the Indian Reorganization Act of 1934 to the Narragansett Indian Tribe, including specifically any support the Secretary has for the assertion made at oral argument and supported by the Brief of Amici Curiae National Congress of American Indians et al., that "all the Secretaries of the Interior for the last 70 years have read the word 'now' to mean the present, as at the time of a tribe's application," and that trust acquisitions for scores of tribes would be implicated if this Court were to accept the state appellants' argument. The State shall file a reply, not to exceed 15 pages, within 10 calendar days of service of the Secretary's response to the petition for

	rehearing en banc. The State is directed to file supplemental briefing, not to exceed 15 pages, and submitted no later than 20 days from the issuance of this order, regarding the State's alternative argument, that even if additional land may be taken into trust on behalf of the Narragansetts, the trust must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction. The Secretary shall file a reply, not to exceed 15 pages, within 10 calendar days of service of the State's supplemental brief. [03-2647]
	* * *
06/15/2005	RESPONSE to Petition for Rehearing En Banc filed by Appellees Franklin Keel and Gale A. Norton [976061-1]. Certificate of service dated 6/13/05. [976061-1] [03-2647]
	* * *
06/16/2005	SUPPLEMENTAL BRIEF filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 15 pages. Copies: 10. Delivered by mail. Certificate of service date 6/15/05. [1005219-1] [03-2647]
	* * *
07/11/2005	SUPPLEMENTAL BRIEF filed by Appellees Franklin Keel and Gale A. Norton. Length: 15 pages. Copies: 10.

	Delivered by mail. Certificate of service date 7/8/05. [1014255-1] [03-2647]
	* * *
07/12/2005	REPLY filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI to appellees' response to appellants' petition for rehearing en banc. Certificate of service dated 7/11/05. [1014237-1] [03-2647]
	* * *
07/19/2005	BRIEF supporting defendant-appellees and opposing rehearing en banc filed by Amicus Curiae Absentee Shawnee Tri, Amicus Curiae Akiak Native Communi, Amicus Curiae Cahto Tribe, Amicus Curiae Cheyenne River Sioux, Amicus Curiae Coeur d'Alene Tribe, Amicus Curiae Confederated Salish, Amicus Curiae Confederated Tribes, Amicus Curiae Eastern Pequot, Amicus Curiae Eastern Shawnee, Amicus Curiae Ely Shoshone Tribe, Amicus Curiae Fallon Paiute-Shosho, Amicus Curiae Ft. McDermitt Paiute, Amicus Curiae Grand Traverse Band, Amicus Curiae Inupiat Community, Amicus Curiae Kenaitze Indian, Amicus Curiae Kickapoo Tribe, Amicus Curiae Lac Courte Oreilles, Amicus Curiae Lovelock Paiute, Amicus Curiae Lummi Nation, Amicus Curiae Moapa Paiute Band, Amicus Curiae Modoc Tribe of

	OK, Amicus Curiae Narragansett Indian, Amicus Curiae Native Village of, Amicus Curiae Nez Perce Tribe, Amicus Curiae Oneida Tribe, Amicus Curiae Prairie Band of, Amicus Curiae Pueblo of Laguna, Amicus Curiae Pueblo of Santa Ana, Amicus Curiae Pueblo of Taos, Amicus Curiae Seminole Tribe of FL, Amicus Curiae Shoshone-Paiute, Amicus Curiae Sisseton-Wahpeton, Amicus Curiae St. Regis Mohawk, Amicus Curiae Suquamish Tribe, Amicus Curiae Tanana Chiefs, Amicus Curiae Te-Moak Tribe, Amicus Curiae Tuolumne Band, Amicus Curiae United South and Eas, Amicus Curiae Washoe Tribe of NV, Amicus Curiae Yomba Shoshone Tribe and Amicus Curiae Oglala Sioux Tribe. Length: 17 pages. Copies: 11. Delivered by mail. Certificate of service date 6/14/05. [1017062-1] [03-2647]
	* * *
09/01/2005	RESPONSE to amicus brief opposing rehearing filed by Appellants Donald L. Carcieri, State of Rhode Island and Town of Charlestown, RI. Length: 15 pages. Copies: 10. Delivered by mail. Certificate of service date 8/23/05. [1032640-1] [03-2647]
	* * *
09/13/2005	ORDER entered by Boudin, Chief

	Judge, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges, and DiClerico, Jr., District Judge. The appellants filed a petition for en banc rehearing, which we also construe as a petition for panel rehearing. See First Circuit Internal Operating Procedure X. The petition for panel rehearing is granted, and the petition for rehearing en banc is denied without prejudice as moot. A new period for petitioning for en banc review will begin to run following the entry of a new panel opinion and a new judgment. Accordingly, the panel's opinion issued February 9, 2005, is withdrawn, and the judgment entered February 9, 2005 is vacated. [03-2647]
09/13/2005	CASE Reopened. [03-2647]
09/13/2005	OPINION filed. Judge Jeffrey R. Howard, Judge Joseph A. DiClerico Signed Judge Juan R. Torruella, Authoring Judge, Judge Jeffrey R. Howard, Dissenting Judge PUBLISHED [1036117-1] [03-2647]
09/13/2005	JUDGMENT entered. The district court's grant of summary judgment in favor of the Secretary is affirmed. [1036118-1] [03-2647]
	* * *
11/07/2005	PETITION filed by Appellants Donald

	L. Carcieri, State of Rhode Island and Town of Charlestown, RI for rehearing en banc. [1055890-1] [03-2647] Certificate of Service dated 10/28/05. [03-2647]
	* * *
12/05/2006	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. The petition for rehearing en banc is granted. The panel opinion and partial dissenting opinion of this court of September 13, 2005, are withdrawn, and the judgment of this court of September 13, 2005, is vacated. The parties are permitted, if they wish to do so, to file simultaneous supplemental briefs within 21 days from the date of this order, consisting of not more than 25 pages per side. Fourteen copies of any supplemental brief should be provided, including one copy in WordPerfect format on a computer readable disk. [Amici may also file supplemental briefs by the same deadline, limited to 15 pages.] Copies of briefs previously filed are already available to all of the judges. This case will be heard on January 9, 2007, at 2:00 p.m., En Banc Courtroom, 7th Floor, John Joseph Moakley United States Courthouse, One Courthouse

	Way, Boston, Massachusetts. TORRUELLA, Circuit Judge, dissenting from the order. I respectfully register my objection to the precipitous manner in which the date for this hearing is set. This matter has been pending before this Court since a motion for en banc review was filed on November 7, 2005, and it is only within the past week that a vote has been taken to hear the appeal en banc. Considering the brief time between this order and the appointed hearing date, and given the intervening holiday season, I do not believe the parties are given adequate time for the preparation of supplementary briefs and for amici curiae to enter an appearance. [03-2647]
12/05/2006	CASE Reopened. [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Appellee Franklin Keel and Appellee Gale A. Norton. Length: 25 pages, Copies: 13, delivered by First Class Mail. Certificate of service date 12/26/06. [1199048-1] [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Length: 15 pages,

	Copies: 13, delivered by First Class Certificate of service date 12/26/06. [1199051-1] [03-2647]
	* * *
12/27/2006	En Banc SUPPLEMENTAL BRIEF filed by Amicus Curiae National Congress of American Indians, individual Indian Tribes, and tribal organizations. Length: 15 pages, Copies: 14, delivered by First Class Mail. Certificate of service date 12/26/06. [1199056-1] [03-2647]
	* * *
01/09/2007	CASE ARGUED EN BANC 1/9/07. Boudin, Ch. J., Torruella, Selya, Lynch, Lipez, Howard, JJ. [03-2647]
01/16/2007	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. One of the issues addressed in the briefs and in the oral argument heard in this case on January 9, 2007, is (in shorthand terms) whether—as the Secretary contends—administrative practice supports the Secretary's interpretation of the Indian Reservation Act to permit trusteeing of land of a tribe not recognized at the time that the statute was enacted (and not eligible under one of the other

	provisions of that statute or separate legislation). Some information on this issue has already been presented by the parties and amici but, it was suggested, further information may be available. If the Secretary or other parties or amici aligned with the Secretary wish to submit further information on this issue, leave to file such a supplemental brief or briefs—limited to this issue—is granted and such a brief or briefs may be filed within 21 days of the date of this order. A responsive brief or briefs may be filed by the State of Rhode Island or other parties or amici aligned with the State's position within 21 days after the deadline fixed for the Secretary. Each brief is limited to 15 pages but supporting documents, such as administrative rulings, may be appended without page limit. Fourteen copies of each brief shall be filed, as well as one copy on a computer readable disk. See 1st Cir. R. 32.0. Additionally, counsel are directed to Fed. R. App. P. 32 regarding brief format (except as to page count). It is so ordered. [03-2647]
	* * *
02/07/2007	Post Argument En Banc SUPPLEMENTAL BRIEF filed by Amicus Curiae National Congress of American Indians, individual Indian Tribes, and tribal organizations in

	support of Defendants-Appellees. Length: 14 pages (3,873 words), Copies: 11, delivered by Overnight Mail. Certificate of service date 2/6/07. [1211684-1] [03-2647]
	* * *
02/07/2007	Post Argument En Banc SUPPLEMENTAL BRIEF filed by Appellee Franklin Keel and Appellee Gale A. Norton. Length: 14 pages, Copies: 14, delivered by First Class Mail. Certificate of service date 2/6/07. [1211926-1] [03-2647]
	* * *
02/27/2007	Post-Argument SUPPLEMENTAL BRIEF filed by Amicus Curiae States of Alabama, Alaska, Connecticut, Idaho, Kansas, Missouri, North Dakota, South Dakota and Utah in support of the state of Rhode Island. Length: 13 pages, Copies: 15, delivered by mail. Certificate of service date 2/26/07. [1219657-1] [03-2647]
	* * *
03/01/2007	Post En Banc Oral Argument SUPPLEMENTAL BRIEF filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Length: 27 pages, Copies: 13, delivered by First Class Mail. Certificate of service date 2/27/07.

	[1220434-1] [03-2647]
	* * *
07/20/2007	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard, Signed Judge Sandra L. Lynch, Authoring Judge, Judge Jeffrey R. Howard, Dissenting Judge, and Senior Judge Bruce M. Selya, Dissenting Judge. PUBLISHED. [1269346-1] [03-2647]
07/20/2007	JUDGMENT entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decision of the district court is affirmed. Costs are awarded to the Secretary of the Interior. [1269354-1] [03-2647]
08/13/2007	MOTION For A Stay Of Mandate Pending Supreme Court Disposition filed by Appellant Donald L. Carcieri, Appellant State of RI, and Appellant Charlestown, RI. Certificate of service

	dated 8/10/07. [03-2647]
	* * *
08/16/2007	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Senior Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, and Judge Jeffrey R. Howard. The issuance of mandate is hereby stayed for appellants pending the timely filing of a petition for a writ of certiorari and, if a timely petition is filed, pending a resolution of the petition by the United States Supreme Court. If the petition for certiorari is denied, mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellants are directed promptly to notify the clerk of this court both of the filing of any such petition for certiorari and the disposition. [03-2647]
	* * *

U.S. District Court
District of Rhode Island (Providence)
CIVIL DOCKET FOR CASE#: 1:00-CV-00375-ML

Carcieri, et al v. Norton et al
Assigned to: Judge Mary M Lisi
Demand: $0
Case in other court: 03-02647
03-02647
Cause: 05:702 Administrative Procedure Act
Date Filed: 07/31/2000
Date Terminated: 09/29/2003
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
07/31/2000	1	COMPLAINT filed; FILING FEE $150.00 RECEIPT # 45444 (McCabe, F) (Entered: 08/01/2000)
08/01/2000		CASE assigned to Judge Mary M. Lisi. Assigned to Magistrate Judge Lovegreen (McCabe, F) (Entered: 08/01/2000)
08/30/2000		CASE reassigned to Judge Ernest C. Torres. Assigned to Magistrate Judge Robert W. Lovegreen (Webb, J) (Entered: 08/30/2000)
* * *		

09/22/2000	4	MOTION by Lincoln Almond, State of Rhode Island, Town of Charlestown for Temporary Restraining Order (Mercurio, A) (Entered: 09/22/2000)
		* * *
09/30/2000	7	ORDER granting [4-1] motion for Temporary Restraining Order (signed by Judge Ernest C. Torres) (Webb, J) (Entered: 10/05/2000)
		* * *
11/20/2000	9	ANSWER to Complaint by Bruce Babbitt, Franklin Keel (Attorney Charles Jakosa), (Mercurio, A) (Entered: 11/20/2000)
		* * *
01/15/2002	50	MOTION by Franklin Keel, Gale A. Norton for Summary Judgment (Mercurio, A) (Entered: 01/16/2002)
		* * *
01/16/2002	53	JOINT MOTION by Lincoln Almond, State of Rhode, Town of Charlestown for Summary Judgment (Mercurio, A) (Entered: 01/16/2002)
		* * *

02/15/2002	57	MOTION by Franklin Keel, Gale A. Norton for Summary Judgment (Mercurio, A) (Entered: 02/19/2002)
	* * *	
07/18/2002	63	ORDER transferring case to Judge Lisi (signed by Judge Ernest C. Torres) (mailed to counsel of record) (Mercurio, A) Modified on 07/18/2002 (Entered: 07/18/2002)
	* * *	
09/29/2003	72	MEMORANDUM and ORDER granting [57-1] motion for Summary Judgment, denying [53-1] joint motion for Summary Judgment, granting [50-1] motion for Summary Judgment—mailed to counsel of record (signed by Judge Mary M. Lisi) (Barletta, B) (Entered: 09/29/2003)
09/29/2003	73	JUDGMENT for Franklin Keel, Gale A. Norton against State of Rhode, Town of Charlestown (pursuant to the Memorandum and Order denying plaintiffs' Motion for Summary Judgment and Granting defendants' motion for summary judgment—mailed to counsel of record) (Barletta, B) (Entered: 09/29/2003)
	* * *	

11/24/2003	75	Stipulation staying execution of judgment until ten days from the issuance of a mandate from the First Circuit Court of Appeals signed by Judge Mary M. Lisi—faxed to counsel of record (Barletta, B) (Entered: 11/24/2003)
11/26/2003	76	NOTICE OF APPEAL by State of Rhode, Town of Charlestown. Fee Status: paid—Appeal record due on 12/26/03 (Duhamel, J) (Entered: 11/26/2003)
* * *		

L-C
31475-27
12494-27
FGT

May 5, 1927

Mr. John Noka,

Shannock, Rhode Island.

Dear Sir:

Receipt is acknowledged of your letter of April 25, 1927, in which you request the Federal Government to take charge of the affairs of the Narragansett Indians.

The Narragansett Indians are and have been under [the] jurisdiction of different states of New England. The federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs.

There is, therefore, no possible way in which this Office can furnish you with any assistance, and all communications in regard to your affairs should be taken up with the proper state officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
31295-27
13494-27

Jun. 29, 1927

Mr. Daniel Sekater,
196 High Street,
Westerly, Rhode Island.

My dear Mr. Sekater:

Receipt is acknowledged of your letter of June 22, 1927, in which you request information as to what is to be done in regard to the Narragansett Indians.

The Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of different States of New England.

There is therefore no possible way in which this Office can furnish the Narragansett tribe with any assistance, and all matters in regard to your affairs should be taken up with the proper State officials.

Very truly yours,

(Signed) E.B. Meritt
Assistant Commissioner.

L-C
14516-37
FGT

Mar. 18, 1937

Hon. John M. O'Connell

House of Representatives

My dear Mr. O'Connell:

Receipt is acknowledged of your letter of March 8, with reference to settlement of the purported claim of the Narragansett Tribe of Indians of Rhode Island.

We have had correspondence directly with Mr. Daniel Sekater relative to the matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe with any assistance.

The situation has not changed since the above mentioned letter was written.

The Narragansett Indians dealt with the Crown of Great Britain through the Colonial Government and their affairs were practically disposed of at the time of the Revolutionary War and before the organization of the Federal Government under the Constitution of the United States. These Indians could, therefore, have no claim against the Federal Government. If they have a claim for two million

dollars it would be against the State of Rhode Island and not the United States of America.

Sincerely yours,

(Signed) [Illegible]

Commissioner

EXECUTION COPY 2/28/78

JOINT MEMORANDUM OF UNDERSTANDING CONCERNING SETTLEMENT OF THE RHODE ISLAND INDIAN LAND CLAIMS

All parties to *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al,* C.A. No.75-0006 (USDC, DRI) and *Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management,* C.A. No. 75-0005 (USDC, DRI) (together called the "Lawsuits") and the other undersigned persons interested in the settlement of Indian land claims within the State of Rhode Island hereby agree to the following principles and provisions of settlement which are, except for the provisions of Section 18 below, to be considered as inseparable, dependant requirements and which are all conditioned upon requisite, favorable and timely action by the appropriate executive and legislative branches of the governments of the State of Rhode Island and the United States of America:

1. That a state chartered corporation (the "State Corporation") will be created with an irrevocable charter for the purpose of acquiring, managing and permanently holding the lands defined in Sections 2 and 3 below (the "Settlement lands"); the State Corporation will be controlled by a board of directors, the majority whose members will be chosen by a Rhode Island corporation known as "The Narragansett Tribe of Indians" (the "Indian Corporation") or its successor and the remaining members chosen by the State of Rhode Island.

2. That the State of Rhode Island will contribute the Indian Cedar Swamp, the Indian Burial Hill, the land around Deep Pond, and an easement from Kings Factory Road to Watchaug

Pond to the State Corporation. These public portions of the Settlement Lands total approximately 900 acres. Contribution of the State land around Deep Pond is subject to the restrictions set forth below in Section 17.

3. That the Settlement Lands will also include approximately 900 acres of land located within the area outlined in red on the map attached hereto marked Exhibit A. The Settlement Lands shall specifically include those lands held by the defendants named in the Lawsuits which are enumerated on the schedule attached hereto as Exhibit B. These privately held portions of the Settlement Lands shall be acquired at fair market value established without regard to the pendency of the Lawsuits. No private landowner shall be required to convey any land hereunder without his or her consent, which shall be deemed to have been given upon execution of a mutually acceptable option agreement (the "Option"). Any landowner executing an Option shall be paid a nonrefundable option fee by the federal government equal to 5% of the purchase price for a 2-year option. The optionee shall have the right to renew the option for one additional year for a renewal fee paid by the federal government of 2.5% of the purchase price.

4. That the parties to the Lawsuits will support efforts to obtain deferral of both state and federal income taxes resulting from the conveyance of privately held portions of the Settlement Lands.

5. That the federal government will provide the funds, in an amount not in excess of 3.5 million dollars, to acquire the privately held portions of the Settlement Lands.

6. That Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claim. This Federal legislation shall be in form and substance as set forth in the proposed statutory language attached hereto as Exhibit C, unless otherwise agreed by counsel for the private Defendants in the Lawsuit. This legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island.

7. That the Settlement Lands shall be subject to a special federal restriction against alienation, provided that nothing in the federal restriction or in any other aspect of this memorandum shall affect the ability of the State Corporation to grant or otherwise convey (whether voluntary or involuntary, including any eminent domain or condemnation proceedings) easements for public or private purposes.

8. That the Settlement Lands will be held in trust by the State Corporation for the benefit of the descendants of the 1880 Rhode Island Narragansett Roll.

9. That the Settlement Lands will not be subject to local property taxation.

10. That the federal government will reimburse the private defendants in the lawsuits for costs incurred or paid for legal services and disbursements in connection with the lawsuits with respect to any lands involved in the Lawsuits which are not specified in Exhibit B and for which an Option is not executed.

11. That the State Corporation will have the right (after consultation with appropriate state officials) to establish its own regulations concerning hunting and fishing on the Settlement Lands without being subject to state regulations, but shall impose minimum standards for safety of persons and protection of wildlife and fish stock.

12. All the Settlement Lands contributed by the State will be permanently held for conservation purposes by the State Corporation.

13. That, except as otherwise specified in this Memorandum, all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes.

14. That all settlement lands will be subject to a professionally prepared land use plan (the "Land Use Plan") mutually acceptable to the State Corporation and the Town Council. Acceptance of the Land Use Plan shall not be unreasonably withheld by the Town Council. At least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses by the Land Use Plan. Town Council acceptance of the Land Use Plan shall be a condition precedent to the acquisition of the Settlement Lands by the State Corporation. The Town Council, after its acceptance of the Land Use Plan, shall amend the zoning ordinance of the Town of Charlestown in a manner consistent with the Land Use Plan as it applies to the Settlement Lands. Thereafter, the zoning ordinance, as amended to conform with the Land Use Plan, shall control the use of the Settlement Lands and shall not be further amended in a manner

inconsistent with the Land Use Plan without the consent of the State Corporation.

15. That the plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this Memorandum, but will have the same right to petition for such recognition and services as other groups.

16. That the Town of Charlestown will be reimbursed for future services provided in connection with the Settlement Lands with funds provided by the Indian corporation.

17. That contribution by the State of the land around Deep Pond is conditioned upon required and appropriate Federal approval of any conveyance of said land in such manner so as not to affect, in any adverse manner, any benefits received by the State under the Pittman-Robertson Act (16 U.S.C. §669-669i) and the Dingell-Johnson Act (16 U.S.C. §777-777k), and further conditioned upon the retention of permanent State control of and public access to an adequate fishing area within said land.

18. That implementation of all provisions of the Memorandum, except those of Sections 6, 10 and 19, and the payment of the option fees provided for in Section 3 above shall be contingent upon a prompt determination by the Department of the Interior that the Plaintiff in the Lawsuits have a credible claim to the lands involved in the Lawsuits. Plaintiff shall have an opportunity for judicial review of any adverse determination by the Department of the Interior.

19. The Plaintiffs in the Lawsuits agree to cause the Lawsuits to be dismissed with prejudice at the time the portion of the Federal legislation which eliminates title problems pursuant to Section 6 above become effective.

WITNESS the execution hereof under seal as of this twenty-eighth day of February, 1978.

HONORABLE J. JOSEPH GARRAHY,
Governor of State of Rhode Island and Providence Plantations

/s/ _____

TOWN OF CHARLESTOWN, RHODE ISLAND
TOWN COUNCIL

By: /s/ _____

PLAINTIFF: NARRAGANSETT TRIBE OF INDIANS,
By their attorneys,
NATIVE AMERICAN RIGHTS FUND

By: /s/ _____
Thomas N. Tureen

DEFENDANTS: EDWARD WOOD, RHODE ISLAND DIRECTOR OF ENVIRONMENTAL MANAGEMENT

By: /s/
William Granfield Brody,
Assistant Attorney General,
State of Rhode Island

(David F. Giuliano
(Paul E. Bennett
(Alfred Testa

By GOODWIN, PROCTER & HOAR,
their attorneys,

By: /s/
Donald P. Quinn

(Robert E. Cherry
(Castle Realty Company
(Glenn F. Godden
(Mildred L. Godden
(John S. Johnson
(Alice Johnson
(Ethel W. Duguid
(Providence Boys Club
(Greater Providence Young Mens Christian Association
(Sarah J. Browning
(William F. Arnold
(Ruth Arnold
(Thomas L. Arnold
(William Arnold
(Frank W. Arnold
(Thomas L. Arnold, William Arnold, Frank W. Arnold and the Washington Trust Company as trustees for the Estate of Frank Arnold
(Thomas L. Arnold, Laurence Whittemore and the Washington Trust Company as trustees for the Thomas L. Arnold Trust
(Hope W. Hallock
(Edna May McKenzie
(Lloyd E. Fitzgerald
(Joyce M. Fitzgerald
(Edward A. Whipple
(Pauline Whipple

By TILLINGHAST, COLLINS & GRAHAM,
their attorneys,

By: /s/ _____

SOUTHERN RHODE ISLAND LAND DEVELOPMENT CORP.,
By its attorney,

By: /s/ _____
Archibald B. Kenyon, Jr.

FRANKLIN SHORES, INC.,
by its attorney,

By: /s/ _____
John P. Toscano, Jr.

EDNA MAE REED, by her attorney,

By: /s/ _____
Harold B. Soloveitzik

CARL M. RICHARD, by his attorney,

By: /s/ _____
Francis Castrovillari

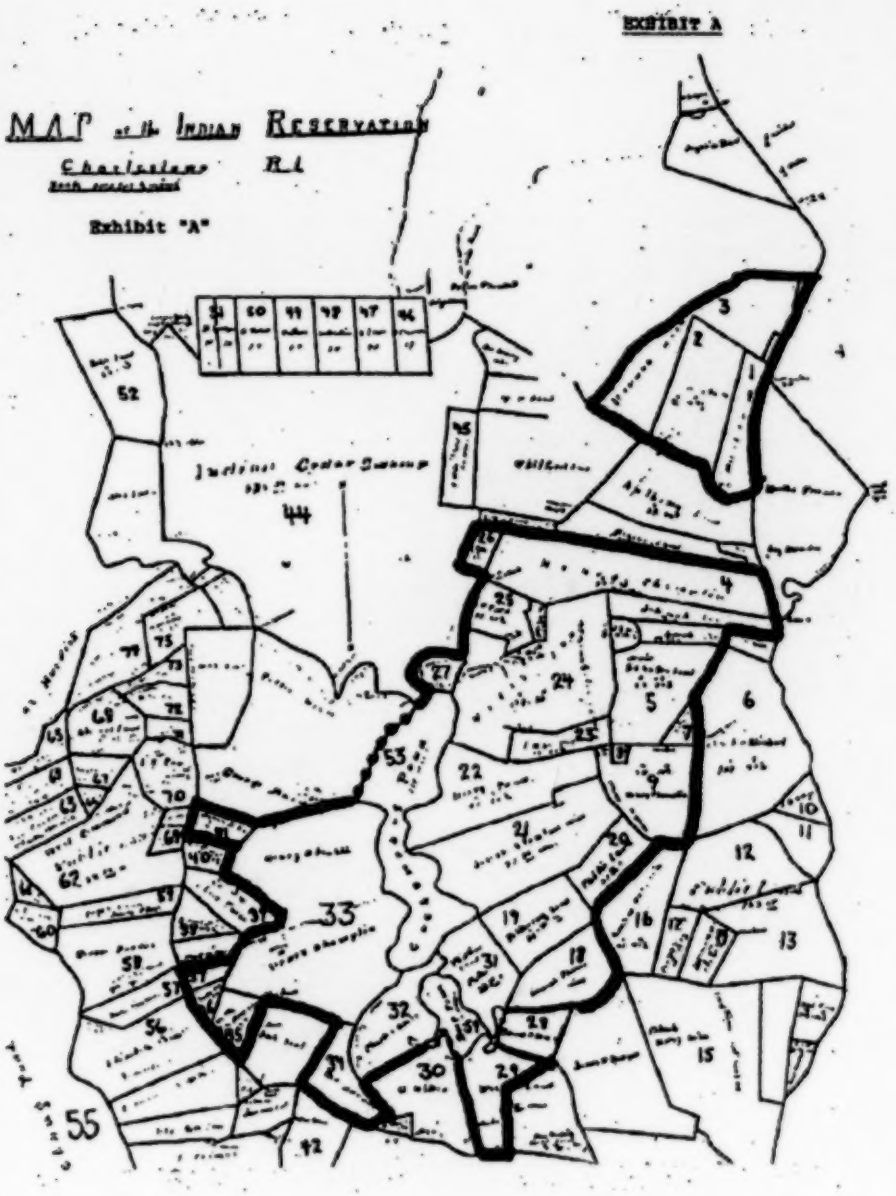
OLD STONE BANK, by its
attorney,

By: /s/ _____
Frank Ray

OLD COLONY CO-OPERATIVE
BANK,
by its attorney,

By: /s/ _____
ARCHIBALD B. KENYON, JR.

EXHIBIT A



Best Available Copy

EXHIBIT B

Providence Boys' Club (with the exception of approximately 100 acres of land adjoining Schoolhouse Pond and Lot No. 17)

Greater Providence Young Mens' Christian Association

Hope W. Hallock

Edna May McKenzie

Southern Rhode Island Land Development Corporation

Franklin Shores, Inc.

Edna Mae Reed

Carl M. Richard (including only lots numbered 5, 7, 8 and 9 and provided further that this land shall be held permanently for conservation purposes and neither the State Corporation, Indian Corporation nor any beneficiary thereof shall have standing in any zoning or other administrative or judicial proceeding involving land presently owned by Castle Realty Company)

Approximately 12 acres of Land of David F. Giuliano

2/13/78 EXHIBIT C

RHODE ISLAND
INDIAN CLAIMS STATUTE

SEC. 1 (a) Any transfer of lands or waters located within the State of Rhode Island from, by or on behalf of any Indian, Indian nation or tribe of Indians, including but not limited to a transfer pursuant to any statute of the State of Rhode Island, was and shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of lands or waters from, by or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Ch. 33, §4, 1 Stat. 138, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve and ratify any such transfer effective as of the date of the said transfer.

(b) To the extent that any transfer of lands or waters described in subsection (a) may involve lands or waters to which any Indian, Indian nation or tribe of Indians had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer.

(c) By virtue of the approval and ratification of a transfer of lands or waters effected by subsection (a) or an extinguishment of aboriginal title effected thereby, all claims against the United States, any state or subdivision thereof, or any other person or entity, by any Indian, Indian nation or tribe of Indians, including but not limited to claims for trespass damages or claims for use and occupancy, arising subsequent to the transfer and that are based upon any interest in or right involving

such lands or waters, shall be regarded as extinguished as of the date of the transfer.

(d) As used in this section, the phrase "lands or waters" shall include any interest in or right involving lands or waters, and the term "transfer" shall include but not be limited to any sale, grant, lease, allotment, partition, conveyance, or any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or conveyance, or any event or events that resulted in a change in possession or control of lands or waters.

RECEIVED
JUN 5 1978
STATE DEPT.

Book 102 – Page 383

DEED

KNOW ALL MEN BY THESE PRESENTS, that the NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND, P.O. BOX 268, Charlestown, RI 02813, for good and valuable consideration, does hereby grant, bargain, remise, release and forever convey unto the UNITED STATES OF AMERICA AS GRANTEE IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND it successors and assigns forever, with WARRANTY COVENANTS, all the right title, interest, claim and demand which the said NARRAGANSETT INDIAN TRIBE OF RHODE ISLAND now has or of right ought to have, or claim, in and to that parcel or tract of land situated in the Town of Charlestown, County of Washington, in the State of Rhode Island, bounded and described as follows:

> Beginning at a maple tree near the Tyas Bridge, so-called, being the northeasterly corner of land conveyed by Charles Cross to George F. Burdick by deed dated December 28, 1867 and recorded in the office of the Town Clerk of the Town of Charlestown in Deed Book 9 at Page 270, and running thence in a southeasterly direction bounding southwesterly on said; Burdick land along the westerly side of a cart path or old Indian Trail to a stake and stones and land now or formerly of Othniel Wilcox et al; thence turning and running northeasterly bounding southeasterly on said last named land to Deep Pond, so-called; thence turning and running in a

northerly direction on a meandering line bounding easterly on Deep Pond till it comes to land sold by Charles Cross to Henry A. Barker by deed dated June 29, 1898 and recorded in said office in Book 13 at Page 467; thence turning and running in a northwesterly direction bounding northeasterly on said Barker land to a point in the shore of School House Pond, sometimes called Cockampaug Pond, where the Kings Factory Brook, so-called, connects with said Pond; thence turning and running in a southwesterly direction bounding northwesterly on land now or formerly of Henry Champlin and in part on land of said Burdick to said maple tree at Tyas Bridge and the point and place of beginning; said last course following the center line of said Brook.

TOGETHER WITH all the right, title and interest of the Grantor in and to said Deep Pond, Cockampaug Pond and Kings Factory Brook and the waters of the same, and TOGETHER WITH right of way to School House Pond as reserved in deed from Charles Cross to Henry A. Barker dated June 29, 1898 and recorded in Charlestown Record Book 13 at Page 467. Said premises are conveyed subject to any existing or used right-of-ways or ancient trails across said property.

Being the same premises conveyed by Deed from Benjamin C. Gavitt and wife, Bessie C. Gavitt to State of Rhode Island and Providence Plantations, dated

September 30, 1957 and recorded October 2, 1957 at 10:05 a.m.

TO HAVE AND TO HOLD the same, with all right, privileges and appurtenances thereunto appertaining, unto and to the use of it the said NARRAGANSETT INDIAN TRIBE, its successors and assigns forever.

TOGETHER WITH and subject to all easements and restrictions as set forth in Title 37, Chapter 18, Section 14 of the Rhode Island General Laws as amended.

Book 102 – Page 384

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/

In Presence Of:

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

/s/

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared the above persons being the Chief Sachem and Tribal Council of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/

Notary Public
Rogeriee Thompson

Pursuant to the delegation from the Assistant Secretary—Indian Affairs to the Eastern Area Director, the undersigned hereby accepts the lands conveyed by this deed on behalf of the United States of America pursuant to Section 5 of the Indian Reorganization Act (Act of June 18, 1934, C. 576, 48 STAT. 986, 25 U. S. C. 465). This action does not alter the applicability of state law conferred by the Rhode Island Indian Claims Settlement Act, Public Law 95-395, 25 U. S. C. 1701 et. seq.

/s/ 9-12-88

B. D. Ott
Area Director
Eastern Area Office

Date

Book 102 – Page 385

IN WITNESS WHEREOF said NARRAGANSETT INDIAN TRIBE has caused these presents to be executed by its governing council this 7th day of January, 1987.

NARRAGANSETT INDIAN TRIBE

BY: /s/
Chief-Sachem

BY: /s/
First Councilperson

In Presence Of:

/s/

STATE OF RHODE ISLAND

County of Washington

In Charlestown, on the 7th day of January, 1987 before me personally appeared David K. Mars and Dawn Dove being the Chief Sachem and First Councilperson respectively of said NARRAGANSETT INDIAN TRIBE to be known and known by me to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free acts and deeds, their free acts and deeds in their Tribal governmental capacities and the free act and deed of said NARRAGANSETT INDIAN TRIBE.

/s/

Notary Public
Rogeriee Thompson

RECEIVED FOR RECORD ON SEPTEMBER 13, 1988
AT 11:05 A.M. AND RECORDED BY:

/s/

Deputy Town Clerk

I, hereby certify the above to
be a true copy and have
affixed the seal of the town
of Charlestown this 10th day
of September 2003

/s/

[SEAL] United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Area Office
Suite 260
3701 North Fairfax Drive
Arlington, Virginia 22203

IN REPLY REFER TO: MAR 6 1998

Trust Services
Branch of Realty

Honorable Matthew Thomas
Chief Sachem, Narragansett Indian Tribe
P.O. Box 268
Charlestown, Rhode Island 02813

Dear Mr. Thomas:

This letter is to inform you of the intent of the Secretary of the Interior to accept the property known as Assessor's Plat 117, Lot 119 of Charlestown, Rhode Island into trust for the use and benefit of the Narragansett Tribe of Indians of Rhode Island.

After consideration of the requirements under the provisions of 25 Code of Federal Regulations, (CFR), Part 151, Land Acquisitions, Sub-sections .10 and .11, and new procedures as established under Final Rule, 25 Code of Federal Regulations, Part 151.12 (61 FR 18082-83), it has been determined to be in the best interest of the Tribe that the subject property be accepted into trust.

This letter will also serve as a letter of notification to the following interested parties:

1. Governor Lincoln Almond
   State of Rhode Island and Providence
   Plantations

State House
Providence, Rhode Island 02908-1196

2. Mr. George Hibbard, Town Administer
Charlestown Town Hall
4540 South County Trail
Charlestown, Rhode Island 02813

3. Mr. Ken Swain, Town Assessor
Charlestown Town Hall
4540 South County Trail
Charlestown, Rhode Island 02813

The property is adjacent to the Tribe's current trust lands and was acquired for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD).

The application was reviewed pursuant to the regulations cited at 25 CFR 151.10 (copy enclosed)

This decision may be appealed to the Interior Board of Indian Appeals (IBIA) within thirty (30) days of receipt of this letter and an Appellant is required to file an opening brief within thirty (30) days after receipt of the IBIA's Notice of Docketing pursuant to regulations cited in 43 Code of Federal Regulations, Part 4.

The IBIA is located at the following address:

U. S. Department of the Interior
Interior Board of Indian Appeals
Office of Hearing and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

If you have any questions regarding this matter, please contact Mr. Bill Wakole, Area Realty Officer at (703) 235-2726.

Sincerely,

/s/ Franklin Keel
Franklin Keel
Eastern Area Director

Enclosure

IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

TOWN OF CHARLESTOWN, RHODE ISLAND
and
GOVERNOR, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-88-A and 98-89-A Decided June 29, 2000

Appeal from a decision to take land into trust for the Narragansett Indian Tribe of Rhode Island.

Affirmed.

1. Indians: Generally—Statutory Construction: Generally—Statutory Construction: Indians

   The interpretation of a statute settling Indian land claims is controlled by the language of the particular statute concerned.

APPEARANCES: James E. Purcell, Esq., Normand G. Benoit, Esq., and Eugene G. Bernardo II, Esq., Providence, Rhode Island, for the Governor; Bruce N. Goodsell, Esq., for the Town; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director; John F. Killoy, Jr., Wakefield, Rhode Island, and Matthew S. Jaffe, Esq., Washington,

D.C., for the Narragansett Indian Tribe; Kevin W. Meisner, Esq., Uncasville, Connecticut, for amicus curiae Mohegan Tribe of Indians of Connecticut.[1]

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Town of Charlestown, Rhode Island (Town), and Governor, State of Rhode Island and Providence Plantations (Governor), seek review of a March 6, 1998, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), deciding to take Assessor's Plat 117, Lot 119, located in Charlestown, Rhode Island, into trust status for the Narragansett Indian Tribe of Rhode Island (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The Board previously addressed a trust land acquisition dispute between the Town and the Tribe in *Town of Charlestown, Rhode Island v. Eastern Area Director* (*Charlestown I*), 18 IBIA 67 (1989). It repeats here part of the background discussion from *Charlestown I*.

> In January 1978, the tribe filed two lawsuits in the United States District Court for the District of Rhode Island concerning its claim to approximately 3,200 acres of public and private land within the boundaries of the Town. A settlement was reached by the parties on February 28, 1978. In

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[1] The Mohegan Tribe of Indians of Connecticut was granted amicus curiae status, but chose not to file a brief.

implementation of the settlement agreement, both Congress and the Rhode Island Legislature enacted legislation. Rhode Island Indian Claims Settlement Act of 1978, *as amended*, 25 U.S.C. §§ 1701-1716 * * * (Settlement Act [or Rhode Island Settlement Act]); Narragansett Indian Land Management Corporation Act of 1979, *as amended*, R.I. Gen. Laws §§ 37-18-1 through 37-18-15. Pursuant to the settlement agreement and the implementing Federal and State legislation, approximately 900 acres of State-owned land and approximately 900 acres of privately-owned land [settlement lands] were to be transferred to the Narragansett Indian Land Management Corporation (corporation), which was, to be chartered by the State.

The tribe received Federal acknowledgement in 1983. By notice published in the *Federal Register* on February 10, 1983, the Assistant Secretary—Indian Affairs issued a determination pursuant to 25 CFR Part 83 that the tribe existed as an Indian tribe. 48 FR 6177 (Feb. 10, 1983). In 1985, the Rhode Island Legislature enacted legislation providing for expiration of the corporation and transfer of settlement lands to the Federally acknowledged tribe. P.L. 1985, ch. 386, R.I. Gen. Laws §§ 37-18-12 through 37-18-14.

18 IBIA at 68.

In *Charlestown I*, the Town objected to trust acquisition of the settlement lands. The Board affirmed the decision to acquire the lands in trust because it found "nothing in the Settlement Act that precludes trust acquisition of the settlement lands or imposes any requirements for their acquisition beyond those contained in 25 CFR Part 151." *Id.* at 71.

As relevant to this appeal, by application dated July 17, 1997, the Tribe requested that BIA take a parcel of land containing approximately 32 acres into trust for it. This parcel was not part of the settlement lands, but rather had been acquired from private developers in 1991 by the Narragansett Indian Wetuomuck Housing Authority (NIWHA). NIWHA made the purchase with funds from the Department of Housing and Urban Development (HUD) for the purpose of providing low-income housing. NIWHA transferred title to the parcel to the Tribe, and the Tribe leased the parcel back to NIWHA. The parcel is separated by a road from other trust lands owned by the Tribe. The application for trust acquisition stated at pages 4-5:

> NIWHA specifically purchased this parcel of land because it was far more suitable for Tribal housing than the Tribe's existing trust lands. As stated by NIWHA to HUD, some of the Tribe's trust lands are unsuitable for development as they are located over the Tribe's sole-source aquifer, are wetlands associated with Indian Cedar Swamp, Schoolhouse Pond and Deep Pond, or are listed on, or eligible for

> listing on, the National Register of Historic Places. Further, only 225 acres of the Tribe's Settlement Lands are available for development.[2]
>
> This parcel of land, however, is quite suitable for development. In fact, the prior owners sought and obtained clearance from various State and local entities to construct a residential subdivision on the property.
>
> Moreover, in order for the Tribe and NIWHA to obtain funding for the development of low-income housing for Tribal members, HUD must be satisfied that there exists an imminent need to "remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income . . ." *See*, United States Housing Act of 1937, 42 U.S.C. Sec. 1401 and 1437; and the Indian Housing Act of 1988, 42 U.S.C. Sec. 1437(a)(a) [sic; probably should be sec. 1437aa].

Despite opposition from both the Town and the Governor, by letter dated March 6, 1998, the Area

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[2] Section 12 of the settlement agreement required that all of the State-contributed settlement lands "be permanently held for conservation purposes." Section 14 required the development of a land use plan for all of the settlement lands under which "[a]t least seventy-five percent of the Settlement Lands not already committed to conservation purposes by Section 12 above will be permanently subjected to conservation uses."

Director notified the Tribe of his intent to take the parcel into trust.

Appellants appealed separately to the Board, but filed a joint opening brief. The Board granted a request from the Area Director to supplement the administrative record, and authorized Appellants to file a supplemental opening brief. Appellants did so. The Area Director and the Tribe filed separate answer briefs.

After the conclusion of briefing, Appellants submitted a copy of *Connecticut v. Babbitt*, 26 F.Supp.2d 397 (D. Conn. 1998). In their transmittal letter, they made additional arguments based on *Connecticut v. Babbitt* and requested a stay of this appeal pending the issuance of a decision in *Connecticut v. Babbitt* by the United States Court of Appeals for the Second Circuit. Both the Area Director and the Tribe responded to Appellants' new arguments and opposed a stay, contending that *Connecticut v. Babbitt* was not dispositive here. Appellants repeated their request for a stay. The Board denied Appellants' request.

Discussion and Conclusions

Decisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based on an exercise of discretion. Rather, it reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." *City of Eagle Butte, South Dakota v. Aberdeen Area Director*, 17 IBIA 192, 196; 96 I.D. 328, 330 (1989). *See also McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997); *Town of Ignacio,*

Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-39 (1999); *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 103-04 (1999). In regard to BIA discretionary decisions, the appellant bears the burden of proving that the Area Director did not properly exercise his discretion. *Lincoln City*, 33 IBIA at 104, and cases cited therein.

However, the Board has full authority to review any legal challenges that are raised in a trust acquisition case. In regard to BIA's legal determinations, the appellant bears the burden of proving that the Area Director's decision was in error or not supported by substantial evidence. *Id.*

Appellants here challenge several legal conclusions which the Area Director reached as well as his exercise of discretion. The Board first addresses those arguments that clearly challenge the Area Director's decision on legal grounds.

Appellants argue that the acquisition of land in trust without the consent of the State is unconstitutional under Article I, sec. 8, cl. 17, of the United States Constitution and under the Eleventh Amendment. The Board interprets this argument as seeking a determination that 25 U.S.C. § 465, the statutory authority for this trust acquisition, is unconstitutional.

The Board has stated on many occasions that, as part of the Executive Branch of Government, it lacks authority to declare an act of Congress unconstitutional. *See, e.g., Lincoln City*, 33 IBIA at 105; *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 133 (1998). The Board lacks jurisdiction to address this argument.

Appellants contend that the Secretary lacks authority to take any land into trust for the Tribe other than the 1,800 acres which were authorized in the Settlement Act. They argue:

> [The Settlement Act] precludes a finding that land outside of the Settlement Lands, (or lands, as in this instance, which were once identified by the Tribe as potential private settlement lands), may be deemed "Indian country" or may be intended to become unrestricted sovereign Indian trust land. The Settlement Act fully and completely resolved the Tribe's land claims and established the boundary of the Tribe's Indian country in Rhode Island. In other words, it has always been the position of [Appellants] that [25 U.S.C. § 1705(a)(3)[3]] extinguished all of the Tribe's claims and limited the boundaries of its Indian country to the Settlement Lands themselves. It was Congress' plain intent in the Settlement Act to set definite limits to the Tribe's Indian country, and to extinguish any claim to greater boundaries. Such Congressional intent must prevail, barring a specific act of Congress expanding such boundaries.

Appellants' Opening Brief at 10.[4]

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[3] This provision is quoted in text below.

[4] The State of Rhode Island made the same argument in *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d

Appellants contend that their position is supported by *Connecticut v. Babbitt*, *supra*. The question in *Connecticut v. Babbitt* was whether the Connecticut Indian Land Claims Settlement Act of 1983 (Connecticut Settlement Act), Pub. L. No. 98-134, 97 Stat. 851, 25 U.S.C. §§ 1751-1760, allowed the Secretary to acquire lands in trust for the Mashantucket Pequot Tribe beyond those authorized as settlement lands in the Connecticut Settlement Act.

The court began its discussion in *Connecticut v. Babbitt* by noting:

> Congress has enacted numerous settlement acts. See 25 U.S.C. § 1701 et seq. One of them contains a provision expressly precluding the federal government from relying on any other authority to acquire land in trust for the benefit of the Indians. See Maine

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[Footnote continued from previous page]

908 (1st Cir. 1996). The court specifically declined to address the argument, stating:

> "The importance of this dispute over whether the Settlement Act terminates the Tribe's ability to increase the territory over which it possesses sovereignty is manifest. * * * Nonetheless, we leave this question * * * for another day. * * * [W]hile it is at heart a question of statutory interpretation, we nonetheless prefer to address the Settlement Act question at a time when the parties, and the court below, have addressed it more fully."

89 F.3d at 914.

> Indian Claims Settlement Act, 25 U.S.C. § 1724(e).[5] Another contains a provision expressly preserving the federal government's authority to take land into trust for the benefit of the Indians under [25 U.S.C.] § 465. See Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. § 1773c.[6] The [Connecticut] Settlement Act does not contain such an express provision one way or the other.

26 F.Supp.2d at 400. The court found that the question before it, like the question now before the Board, was "whether the area under the sovereignty of the Tribe can be expanded against the wishes of the State and the Towns without congressional approval." *Id.*

---

[5] 25 U.S.C. § 1724(e) provides in pertinent part: "Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine."

[6] 25 U.S.C. § 1773c provides:

> "In accepting lands in trust (other than those described in section 1773b of this title [the settlement lands]), for the Puyallup Tribe or its members, the Secretary shall exercise the authority provided him in [25 U.S.C. § 465], and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations, as those standards now exist or as they may be amended in the future."

The primary statutory provision at issue in *Connecticut v. Babbitt* was 25 U.S.C. § 1754(b)(8). That subsection provides:

> Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

The court concluded that the phrase "acquired under this subsection" was ambiguous as to whether it referred to *any* lands acquired outside the settlement lands or whether it referred only to lands that were both outside the settlement lands and acquired with Federal funds provided pursuant to the Connecticut Settlement Act. The court therefore looked to extrinsic aids to statutory construction. It ultimately held that the legislative history supported an interpretation of the subsection and the Connecticut Settlement Act as prohibiting the trust acquisition of any lands except the settlement lands.

Appellants urge the Board to reach the same conclusion as to 25 U.S.C. § 1705(a)(3). Subsection 1705(a) provides in pertinent part:

> If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title [concerning the enactment of specified State legislation], he shall

publish such findings in the Federal Register and upon such publication—

* * * * * *

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presented or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

[1] Although it finds several similarities between the Connecticut and the Rhode Island Settlement Acts, the Board concludes that the specific language used in 25 U.S.C. § 1754(b)(8) and 25 U.S.C. § 1705(a)(3) is too dissimilar to be directly analogous. The Board concludes that *Connecticut v. Babbitt*, while instructive as to the type of individualized statutory interpretation necessary in the present appeal, is not dispositive here. It therefore considers Appellants' substantive argument.

Appellants contend that 25 U.S.C. § 1705(a)(3) did two things: (1) it resolved, or extinguished, the Tribe's land claims, and (2) it limited to the settlement lands the boundaries of the trust land which the Tribe could hold.

In making this argument, Appellants do not analyze the language of 25 U.S.C. § 1705(a)(3), or any other section of the Settlement Act. Nor do they refer to the legislative history. Instead, they discuss the background of the enactment of the Settlement Act. They assert that the agreement on which the Settlement Act was based was intended "to end the dispute and resolve not only the Tribe's land claims, but also establish the boundaries of the Tribe's new settlement land in Rhode Island." Appellants' Opening Brief at 12. They further argue that the Tribe "agreed to the extinguishment of any further right to claim lands within Rhode Island as part of their original 'Indian country.'" *Id.* The Board agrees with these statements, which are merely different ways of saying that the Settlement Act extinguished the Tribe's aboriginal land claims and established the settlement lands.

However, Appellants go a step further and contend that it "was Congress' plain intent in the Settlement Act to set definite limits to the Tribe's Indian country, and to extinguish any claim to greater boundaries." *Id.* at 10. Appellants here argue that Congress prohibited the Tribe from acquiring any lands in trust other than the settlement lands.

Both the Area Director and the Tribe disagree with this aspect of Appellants' interpretation of subsection 1705(a)(3). They contend that the subsection merely extinguished the Tribe's right to

sue for additional lands under a claim of aboriginal title.

The Board has carefully read subsection 1705(a)(3) in light of Appellants' arguments. It finds that the subsection explicitly refers to the extinguishment of aboriginal title and of any claims arising under aboriginal title. However, the subsection does not in any way refer to the acquisition of lands other than the settlement lands. The Board finds no support in the language of the subsection for Appellants' reading of it as precluding the trust acquisition of other lands for the Tribe in the event the Tribe were to be Federally acknowledged.

As mentioned above, Appellants cite nothing from the legislative history of the Settlement Act in support of their position. The section of the bill which became 25 U.S.C. § 1705 is discussed in H.R. Rep. No. 1453, 95th Cong., 2d Sess. (House Report), *reprinted in* 1978 U.S. Code Cong. and Admin. News 1948, 1955:

> Section 6 provides for the extinguishment of (1) aboriginal title to land and (2) all claims based upon any interest in or right involving such lands (including but not limited to claims for trespass or claims for use and occupancy), on behalf of the Narragansett Indians, regardless of where such land is located * * *.

See also, *Id.* at 1951. Like the statute itself, the House Report fails to mention any intent to place restrictions on the Tribe's ability to acquire lands outside the settlement lands or to preclude the trust acquisition of such lands if the Tribe were to be

Federally acknowledged. In its review of the legislative history, the Board found nothing which suggested that Congress intended to impose such limitations.

The settlement agreement which preceded enactment of the State and Federal implementing legislation is included as an appendix to the House Report. It states in section 15:

> [T]he plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this [settlement agreement], but will have the same right to petition for such recognition and services as other groups.

One of the services provided to recognized tribes is the holding of land in trust. Another service, unless otherwise restricted, is the consideration of requests to acquire land in trust. Section 15 of the settlement agreement would have been a logical place for the parties to set out any restrictions which they intended to place on the Secretary's authority to acquire additional land in trust for the Tribe. The fact that no such restrictions appear here—or elsewhere in the settlement agreement—suggests that none were intended.

Based upon the language of the statute and its legislative history, the Board concludes that 25 U.S.C. § 1705(a)(3) does not prohibit the Secretary from acquiring lands other than the settlement lands in trust for the Tribe.

Citing *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130 (1998), Appellants argue that the Area Director erred by failing to consider the possible use of this parcel for gaming purposes under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2121. This argument appears to have two aspects, one of which challenges the decision on legal grounds, while the other challenges the Area Director's exercise of discretion. The Board addresses these aspects of the argument separately.

Appellants note that the Tribe has attempted unsuccessfully to develop a gaming operation in Rhode Island, and contend that BIA "must be constructively presumed to be aware of" the Tribe's activities in furtherance of its interest in having a gaming operation. Opening Brief at 22. They argue that BIA must always consider the possibility of gaming in any trust acquisition "unless the trust taking specifically precludes a future gaming use." *Id.* at 23. Appellants contend that 25 C.F.R. § 1.4(b) authorizes such a restriction.

25 C.F.R. § 1.4(b) provides in pertinent part:

> The Secretary * * * may in specific cases or in specific geographical areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section [*i.e.*, those "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights"] as he shall determine to be in

> the best interest of the Indian owner or owners in achieving the highest and best use of such property.

The Area Director requested an interpretation of 25 C.F.R. § 1.4(b) from the Solicitor's Office when the Governor raised this argument before him. In a November 5, 1997, memorandum, the Southeast Regional Solicitor advised the Area Director that the regulation could not be applied as the Governor argued. The Regional Solicitor stated:

> This regulation is narrowly written. It does not purport to effect changes in the fundamental jurisdictional status of the Indian land. For example, the Bureau may not presume to make Indian land subject to state civil and criminal jurisdiction. This is a prerogative that has been reserved to Congress, and it may not be usurped administratively. *See* 25 U.S.C. § 1321 *et seq.* (consent of the United States is granted to the states to assert criminal and civil jurisdiction over Indian lands upon the consent of the affected tribe); *see also Kennerly v. District Court of Montana*, 400 U.S. 423, 424 n.1 (1971), where the Court held that even a tribe may not grant civil jurisdiction to a state in a manner that has not been authorized by Congress.
>
> Therefore, we must conclude that the Bureau does not possess authority under 25 CFR 1.4(b) to make the lands now proposed for trust acquisition subject to the civil and criminal

> jurisdiction of the State of Rhode Island. The most that the Bureau can do, after consultation with the tribe, is to apply certain land use laws and regulations to tribal lands. It is important to note that if the Bureau acts upon the discretionary authority contained in 25 CFR 1.4(b), the laws and regulations are not applicable by virtue of their own force, and we entertain serious doubts about the ability of the state or local government to enforce them. Rather, such laws and regulations would be enforceable by the tribe and the Bureau.

Regional Solicitor's Nov. 5, 1997, Memorandum at 2.

This memorandum was included in the supplemental administrative record. Appellants had an opportunity to address the analysis in the memorandum in both their supplemental opening brief and in a reply brief. They did not do so. The Board finds that Appellants have failed to carry their burden of proving error in the legal interpretation of 25 C.F.R. § 1.4(b).

Furthermore, Appellants ignore the fact that 25 C.F.R. § 1.4(b) is discretionary. They have not even attempted to show that the Area Director did not properly exercise his discretion in declining to take any action under this regulation.

Appellants continue their *Ruidoso* argument by contending that the Area Director did not properly consider this trust acquisition application under the standard which the Board set out in *Ruidoso*. They assert that

> there is a distinct possibility, considering the unlikely prospect that the housing project can or will ever be brought to fruition as it is presently proposed,[7] and with the failure of the * * * Tribe to achieve its gaming objective elsewhere in the state, that this parcel, if taken into trust free of the civil and criminal laws and jurisdiction of the State of Rhode Island * * * may well be selected for future IGRA gaming activities.

Appellants' Opening Brief at 22.

In *Ruidoso*, there was evidence that, despite its statements concerning how it intended to use the property it sought to acquire in trust, the tribe might actually have been considering using the property for gaming purposes. The Board held:

> In order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property.

32 IBIA at 139. *See also Lincoln City*, 33 IBIA at 107.

The Board has held that mere speculation by a third party that a tribe might, at some future time,

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[7] This suggestion is addressed further below.

attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust. *See, e.g., Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director*, 34 IBIA 235, 238 (2000); *Town of Ignacio*, 34 IBIA at 41.

Appellants have not cited anything in this case which suggests that the Tribe intends to use this parcel for a purpose other than housing. Their speculations do not carry their burden of proving that the Area Director did not properly exercise his discretion by considering only the proposed use of this parcel which the Tribe articulated.

Appellants raise two arguments based on the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1465. They first argue that, before deciding whether to acquire this land in trust, the Area Director was required by 16 U.S.C. § 1456(c) to obtain a determination from the Rhode Island Coastal Resources Management Council (CRMC) that the Tribe's proposed construction of a 50-unit housing development was consistent with CRMC's coastal zone regulations.[8] Appellants contend that because the Area Director did not obtain this

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[8] 16 U.S.C. § 1456(c)(1)(C) provides:

> "Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455 (d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the state agency agree to a different schedule."

determination, he violated 25 C.F.R. § 151.10(b), (c), and (f).[9]

The Board interprets this to be an argument that the Area Director did not properly exercise his discretion under 25 C.F.R. § 151.10(b), (c), and (f) because he did not prepare a Federal Consistency

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9 25 C.F.R. § 151.10 provides in pertinent part:

> "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
>
> * * * * * *
>
> "(b) The need of the * * * tribe for additional land;
>
> "(c) The purposes for which the land will be used;
>
> * * * * * *
>
> "(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> "(f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> "(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> "(h) The extent to which the applicant has provided information that allows the Secretary to comply with [the National Environmental Policy Act and Departmental provisions relating to hazardous substances determinations]."

Determination for a 50-unit housing development before deciding to acquire this parcel in trust.

The Tribe responds that it "fully acknowledges that the development of its housing project must comply with the CZMA." Tribe's Answer Brief at 24. It contends, however, that the question before the Board is not whether the housing development comports with the coastal zone regulations, but "whether the BIA complied with the CZMA in its action to accept the land in trust for the Tribe." *Id.* The Tribe continues in footnote 16: "[T]here is a significant difference between the act of accepting the land in trust and the future construction and occupancy of the homes." The Tribe states that the CRMC "considered all relevant factors at a *public hearing* and determined that the act of taking the land in trust by the BIA did not violate the requirements of the CZMA." *Id.*

Although they had an opportunity to do so by filing a reply brief, Appellants did not respond to or dispute the Tribe's assertion that the appropriate State agency has determined that the trust acquisition of this land does not require a Federal Consistency Determination under the CZMA.

The Board agrees with the Tribe that there is a distinction between the trust acquisition and the ultimate use of the land. It finds that Appellants have failed to show that the Area Director erred in the exercise of his discretion under 25 C.F.R. § 151.10(b), (c), and (f) by not preparing a Federal Consistency Determination for the proposed housing project before deciding to acquire the parcel in trust.

Appellants continue their CZMA argument by contending that the Area Director violated 25 C.F.R. § 151.10(e), (f), (g), and possibly (h) because, without

the Federal Consistency Determination required under the CZMA, "HUD approval and funding of a 50 unit development is seriously flawed." Appellants' Opening Brief at 8.

Although it is somewhat at a loss as to how to characterize this argument, the Board finds that the determinative factor here is that it does not have review authority over decisions made by HUD. If the land is ultimately used for the construction of less than 50 residential units, and if HUD believes that that different usage causes a problem for it, then the matter must be resolved between HUD and the Tribe. This argument is not, however, relevant to the question of whether the Area Director properly exercised his discretion in determining to acquire the land in trust.

Appellants contend that the Area Director erred because the Tribe's trust acquisition application proposed a deed description that failed to provide for drainage easements held by the Town.

Citing *Narragansett Indian Tribe v. Narragansett Electric Co.*, 878 F. Supp. 349, 365 (D.R.I. 1995), the Tribe acknowledges that the "Town clearly has a deeded property interest in the easement which is inalienable without its consent." Tribe's Answer Brief at 27. However, the Tribe notes that, in an August 22, 1996, letter from the President of the Town Council to the Area Director, the Town recognized that the Tribe's plans for the property require re-engineering and relocation of the drainage easement.

The Area Director states: "The Bureau is always amenable to working with interested parties to ensure that their interests are protected. It is a certainty in this case that had the Town indicated its

concern to the Bureau, the deed would have been redrafted. * * * [T]he Town of Charlestown is issued an open invitation to confer with the Bureau and [counsel] with regard to deed language." Area Director's Answer Brief at 8.

Again, Appellants did not respond to or dispute these statements.

The Board finds that, whether this argument is characterized as a legal challenge to the trust acquisition decision or as an attack on the Area Director's exercise of his discretion, Appellants have failed to show that the Area Director erred in his consideration of the trust acquisition application because of the wording of the deed in regard to the Town's drainage easement.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's March 6, 1998, decision is affirmed.[10]

/s/
Kathryn A. Lynn
Chief Administrative Judge

I concur:

/s/
Anita Vogt
Administrative Judge

10 All motions not previously addressed are denied.

* * *

CERTIORARI GRANTED

07-526 CARCIERI, GOV. OF RI, ET AL. V. KEMPTHORNE, SEC. OF INTERIOR

The Motion of Citizens Equal Rights Foundation, et al. for leave to file a brief as *amici curiae* out of time is denied. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

* * *

PETITIONER'S BRIEF

94

No. 07-526

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IN THE

Supreme Court of the United States

DONALD L. CARCIERI,
Governor of Rhode Island, ET AL.,
Petitioners,

v.

DIRK KEMPTHORNE,
Secretary of the Interior, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONER DONALD L. CARCIERI

CLAIRE RICHARDS
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Donald L. Carcieri

QUESTIONS PRESENTED

1. Whether the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was neither federally recognized nor under federal jurisdiction at the time of the statute's enactment.

2. Whether the Rhode Island Indian Claims Settlement Act prohibits the Secretary of the Interior from taking land in Rhode Island into trust on behalf of an Indian tribe.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the State of Rhode Island and Providence Plantations, and the Town of Charlestown, Rhode Island, were plaintiffs-appellants below and are petitioners in this Court, and Franklin Keel, Eastern Area Director of the Bureau of Indian Affairs, was a defendant-appellee below and is a respondent in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

SUMMARY OF ARGUMENT 13

ARGUMENT 17

I. THE SECRETARY MAY NOT TAKE LAND INTO TRUST ON BEHALF OF THE NARRAGANSETTS BECAUSE THEY WERE NEITHER FEDERALLY RECOGNIZED NOR UNDER FEDERAL JURISDICTION IN 1934 17

A. The Text Of The IRA Unambiguously Establishes That The Secretary Lacks The Authority To Take Land Into Trust On Behalf Of The Narragansetts 17

B. The Structure And Purpose Of The IRA Confirm That The Secretary Cannot Take Land Into Trust On Behalf Of The Narragansetts 29

II. THE SETTLEMENT ACT PROHIBITS THE SECRETARY FROM TAKING THE 31-ACRE PARCEL INTO TRUST ON BEHALF OF THE NARRAGANSETTS 35

A. The Plain Language Of The Settlement Act Prohibits The Narragansetts From Asserting Claims To Sovereignty Over The 31-Acre Parcel 36

B. The Secretary's Acquisition Of The 31-Acre Parcel In Trust For The Narragansetts Would Undermine The Objectives Of The Settlement Act 42

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) 45, 46

Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983) 44

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).....30

Carcieri v. Norton, 398 F.3d 22 (1st Cir. 2005) 10

Carcieri v. Norton, 423 F.3d 35 (1st Cir. 2005) 11

Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 11, 18

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005).....43

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).....3

De Coteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425 (1975) 4, 39

De Lima v. Bidwell, 182 U.S. 1 (1901).....20

Difford v. Sec'y of Health & Human Servs., 910 F.2d 1316 (6th Cir. 1990).....27

Duncan v. Walker, 533 U.S. 167 (2001).....23

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 41

Franklin v. United States,
216 U.S. 559 (1910) 14, 24

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 27

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 19

Hibbs v. Winn,
542 U.S. 88 (2004) 20

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 28

Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) 34

Kahawaiolaa v. Norton,
386 F.3d 1271 (9th Cir. 2004) 26

Montana v. Kennedy,
366 U.S. 308 (1961) 14, 23, 24

Montana v. United States,
450 U.S. 544 (1981) 39

In re Narragansett Indians,
40 A. 347 (R.I. 1898) 6

Narragansett Tribe of Indians v. R.I. Dir. of Envtl. Mgmt., No. 75-0005
(D.R.I. filed Jan. 8, 1975) 7

Narragansett Tribe of Indians v. S. R.I. Land Dev. Co., No. 75-0006
(D.R.I. filed Jan. 8, 1975) 7

Pierce v. Pierce,
287 N.W.2d 879 (Iowa 1980).....27

Sheridan v. United States,
487 U.S. 392 (1988).....41

South Dakota v. Bourland,
508 U.S. 679 (1993).....39

Sullivan v. Stroop,
496 U.S. 478 (1990).....18, 21

United States v. Anderson,
625 F.2d 910 (9th Cir. 1980).....29

United States v. John,
437 U.S. 634 (1978).....14, 19, 25

United States v. John,
560 F.2d 1202 (5th Cir. 1977).....26

United States v. Miss. Tax Comm'n,
505 F.2d 633 (5th Cir. 1974).....26

United States v. Press Publ'g Co.,
219 U.S. 1 (1911).....24

Williams v. Ragland,
567 So. 2d 63 (La. 1990).....27

STATUTES

Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 24

Act of July 7, 1898, ch. 576, 30 Stat. 717 24

Act of June 30, 1919, ch. 4, 41 Stat. 3 32

Act of Mar. 3, 1921, ch. 135, 41 Stat. 1355.....32

Burke Act, ch. 2348, 34 Stat. 182
(May 8, 1906).....3

General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Feb. 8, 1887) 2, 3
Rev. Stat. § 2172 24
R.I. Gen. Laws § 37-18-12 9
R.I. Gen. Laws § 37-18-13 9
R.I. Gen. Laws § 37-18-14 9
18 U.S.C. § 13(a) 25
25 U.S.C. § 177 ..... 7, 36
25 U.S.C. § 461 ..... 1, 4
25 U.S.C. § 465 ..... 1, 4, 13, 14, 17, 21, 28, 30
25 U.S.C. § 468 ..... 13, 22
25 U.S.C. § 471 4
25 U.S.C. § 472 ..... 4, 13, 22
25 U.S.C. § 475a 22
25 U.S.C. § 477 4
25 U.S.C. § 478 29
25 U.S.C. § 479 ..... 5, 10, 13, 14, 18, 20, 25, 34
25 U.S.C. § 484 21
25 U.S.C. § 1300b-14(a) 23
25 U.S.C. § 1300i-8(a)(2) 23
25 U.S.C. § 1603(c) 23
25 U.S.C. § 1701 ..... 1, 2
25 U.S.C. § 1705(a) 38
25 U.S.C. § 1705(a)(1) 37, 43
25 U.S.C. § 1705(a)(2) 9, 37, 46

25 U.S.C. § 1705(a)(3) 9, 16, 38, 39, 42, 46
25 U.S.C. § 1706(a)(1) 8, 47
25 U.S.C. § 1706(a)(2) 8, 47
25 U.S.C. § 1707(a).....37, 46
25 U.S.C. § 1707(c) 9, 46, 47
25 U.S.C. § 1708(a).....8, 37, 43, 44
25 U.S.C. § 1712(a).....38
25 U.S.C. § 1712(a)(1) 43
25 U.S.C. § 1712(a)(2) 46
25 U.S.C. § 1712(a)(3) 43, 46
25 U.S.C. § 1724(e).....42
25 U.S.C. § 1754(b)(8) 42
43 U.S.C. § 1601 45

REGULATIONS

25 C.F.R. § 1.4 .....4, 39
48 Fed. Reg. 6177 (Feb. 10, 1983).....9

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.....2, 3, 5, 29, 30, 33
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U.S. Dep't of the Interior Solicitor Op. M-36975 (Jan. 19, 1993) 45

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BRIEF FOR PETITIONER DONALD L. CARCIERI

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-81) is published at 497 F.3d 15. The opinion of the district court (Pet. App. 84-136) is published at 290 F. Supp. 2d 167.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007, and granted on February 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq.*, and the Rhode Island Indian Claims Settlement Act ("Settlement Act"), 25 U.S.C. § 1701 *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

Petitioners challenge the decision of the Secretary of the Interior to remove a 31-acre parcel of land in Charlestown, Rhode Island, from the State's civil and criminal jurisdiction by acquiring the land in trust for the Narragansett Indian Tribe ("Tribe"). There are two independent statutory provisions that prohibit the Secretary from using his trust authority to divest the State of jurisdiction over the 31-acre parcel and create sovereign Indian territory in Rhode Island for the first time since Statehood.

First, under Section 5 of the IRA, 25 U.S.C. § 465, the Secretary's authority to acquire land in

trust for Indian tribes is generally restricted to those tribes that were both federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934. It is undisputed that the Tribe meets neither of these eligibility requirements. Second, the Settlement Act, 25 U.S.C. § 1701 *et seq.*, extinguishes all claims—including claims to territorial sovereignty—regarding land that the Tribe has transferred to other landowners. Because the Tribe long ago transferred the 31-acre parcel that is the subject of its trust application, the Settlement Act prohibits the Secretary from granting the Tribe's claim to sovereignty over that land.

The First Circuit's decision upholding the Secretary's acquisition of the 31-acre parcel is at odds with the language, structure, and purpose of both of these federal statutes, and should be reversed.

A. Statutory And Historical Background

1. The federal government's Indian policy has undergone a number of substantial shifts during the past two centuries. The IRA is the product of one of those shifts. Its enactment in 1934 marked a significant break with the policies that the federal government had been pursuing under the General Allotment Act of 1887 ("Allotment Act"), ch. 119, 24 Stat. 388 (Feb. 8, 1887), which had vastly reduced the amount of reservation land set aside for Indian tribes and left a large number of Indians landless.

As the House sponsor of the IRA explained, Congress had intended that the Allotment Act assimilate Indians into broader American society by "substitut[ing] individual, private ownership of Indian land for tribal ownership." Congressional Debate on the Wheeler-Howard Bill 1961 (1934), in 3 *The American Indian and the United States* (Wilcomb E. Washburn

ed., 1973) (hereinafter IRA Legislative History) (statement of Rep. Howard); *see also County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992) ("The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."). To that end, the Allotment Act "provided for the parceling of the Indian reservations into small individual allotments." IRA Legislative History, *supra*, at 1961 (statement of Rep. Howard). The Allotment Act originally provided for the United States to hold these allotted lands in trust for the individual Indian allottees for a period of twenty-five years, at the conclusion of which the land would be transferred to the allottees in fee simple and become fully alienable. Allotment Act, 24 Stat. at 389. As the demand for Indian land grew, however, this restriction was relaxed through congressional measures that "authorized elimination of all trust restrictions if an allottee was deemed competent," which expedited the alienation of Indian land to non-Indians. Felix S. Cohen, *Handbook of Federal Indian Law* 133 (1982 ed.); *see also* Burke Act, ch. 2348, 34 Stat. 182 (May 8, 1906). The Allotment Act further authorized the United States to purchase "surplus" reservation land not allotted to individual Indians and to make that land available to non-Indian settlers. Cohen, *supra*, at 133.

As a direct result of the allotment policy, Indian landholdings were reduced from 137 million acres in 1887 to 47 million acres in 1934. IRA Legislative History, *supra*, at 1957-58; *see also id.* at 1962 (statement of Rep. Howard) ("Many reservations have in Indian ownership a mere fragment of the original land."). The number of landless Indians in-

creased during this period from 5,000 to 100,000. *Id.* at 1958.

The IRA ended this allotment policy by prohibiting further allotments of reservation land. 25 U.S.C. § 461. In order to provide land for those tribes and individual Indians that been rendered landless by the allotment policy, Section 5 of the IRA authorized the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians." *Id.* § 465. "Title to [such] lands . . . [is] taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* Like other forms of "Indian country," land that the Secretary acquires in trust for a tribe or individual Indian under his Section 5 authority is not generally subject to state civil and criminal jurisdiction or to local zoning requirements. 25 C.F.R. § 1.4; *see also De Coteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 (1975).

Other provisions of the IRA were intended both to strengthen Indian tribes—by, for example, authorizing tribes to organize themselves as corporate entities (25 U.S.C. § 477)—and benefit individual Indians—including through a loan program to fund Indian education (*id.* § 471) and an employment preference for Indians seeking work with the Indian Office of the Department of the Interior. *Id.* § 472.

The IRA restricted its benefits to persons who met the statutory definition of "Indian," which encompasses

> all persons of Indian descent who are members of any recognized Indian tribe now un-

> der Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479. As the House sponsor of the IRA explained, the definition "recognize[d] the status quo of the present reservation Indians and further include[d] all other persons of one-fourth or more Indian blood." IRA Legislative History, *supra*, at 1972 (statement of Rep. Howard).[1] This provision was designed to shield the federal government from "impossible financial burdens" by "prevent[ing] persons" without the requisite quantum of Indian blood "who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and other benefits of the act." *Id.* at 1973.

2. The Narragansett Tribe was not subject to the ill-conceived allotment policy because it did not possess a federal reservation during the late-nineteenth and early-twentieth centuries, and thus did not hold any property that could have been allotted by the federal government.

The Tribe has a documented history dating back to at least 1614. U.S. Dep't of the Interior, *Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Narragansett Indian Tribe of Rhode Island* 1 (1982) (hereinafter Recommendation), *at* http://www.indianz.com/adc20/Nar%5CV001%5CD007.pdf. Al-

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[1] Congress changed the one-fourth Indian blood quantum to one-half before the IRA was enacted. *See* 25 U.S.C. § 479.

though it was at one time one of the most powerful tribes in New England, the Tribe declined in size and political influence during the mid-seventeenth century due to epidemics and conflicts with other tribes. *Id.* at 2. After suffering heavy losses in King Philip's War from 1675-76, much of the Tribe dispersed. *Id.* Some members joined other New England tribes, including a number who combined with a neighboring tribe, the Niantics, located in Charlestown, Rhode Island. *Id.*

From 1675 until 1880, the Tribe was subject to a form of guardianship under the colony and, later, the State of Rhode Island. Recommendation, *supra*, at 2-3. During this period, the Tribe lived among, and intermarried with, Rhode Island's non-Indian population. *Id.* at 2. Unlike tribes that possessed reservation land set aside for them by the federal government, the Narragansetts lived under the jurisdiction of the State, and the Tribe's land—like the land of the State's non-Indian inhabitants—was subject to the requirements of state law. *See In re Narragansett Indians*, 40 A. 347, 361-62 (R.I. 1898). In 1879, the Narragansett Tribal Council voted to sell nearly all of its remaining 927 acres of tribal land. Recommendation, *supra*, at 4. A year later, the Rhode Island General Assembly passed legislation abolishing tribal authority, declaring tribal members to be citizens of the State, and authorizing the sale of tribal land. *Id.* The proceeds of the land sale were distributed to individual members of the Tribe. *Id.*[2]

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[2] In order to distribute the money raised from the sale of tribal land to members of the Tribe, the State, in cooperation with the Tribal Council, prepared a list of approximately 324 tribal members. R· ·mmendation, *supra*, at 4. The current requirement for membership in the Tribe is proof of lineal de-

After severing its guardianship relationship with the State, the Tribe sought to obtain economic support and other aid from the federal government. Between 1927 and 1937, the Tribe wrote a number of letters to the Department of the Interior seeking assistance. Each time, the Department refused on the ground "that there was no Federal responsibility for or jurisdiction over the group." Recommendation, *supra*, at 8. In those letters, the Department explained that the "Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of different States of New England." J.A. 22a; *see also id.* at 21a.

3. In 1975, the Tribe brought two lawsuits against the State of Rhode Island, the Town of Charlestown, and a number of Charlestown landowners to recover 3,200 acres of land to which it claimed to possess aboriginal title. *Narragansett Tribe of Indians v. R.I. Dir. of Envtl. Mgmt.*, No. 75-0005 (D.R.I. filed Jan. 8, 1975); *Narragansett Tribe of Indians v. S. R.I. Land Dev. Co.*, No. 75-0006 (D.R.I. filed Jan. 8, 1975). The Tribe alleged that its sale of this land was invalid because it was undertaken without congressional approval in violation of the Indian Trade and Intercourse Act of 1790, 25 U.S.C. § 177.

In 1978, the parties agreed to settle the lawsuits and executed a Joint Memorandum of Understand-

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[Footnote continued from previous page]

scent from that membership list, rather than satisfaction of a blood quantum requirement. *Id.* at 15.

ing ("JMOU") that was signed by the Tribe, the State, and the Town. In order to "settle[ ] . . . Indian land claims within the State of Rhode Island," the JMOU provided for the establishment of a state-chartered corporation that would "acquir[e], manag[e] and permanently hold[ ]" approximately 1,800 acres within the Tribe's former domain that were either donated by the State or acquired with $3.5 million in federal funds appropriated for the purpose. J.A. 25a, 26a. These so-called "Settlement Lands" were to be held in trust by the state-chartered corporation for the benefit of the Tribe (*id.* at 27a), but—unlike land held in trust for a tribe by the federal government—were to be subject to the "full force and effect" of state law. *Id.* at 28a; *see also id.* (authorizing the Tribe to enact its own hunting and fishing regulations on the Settlement Lands). In exchange, the Tribe agreed that federal legislation would be obtained that "eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." *Id.* at 27a. The Tribe agreed to dismiss its lawsuits with prejudice upon the effective date of that legislation. *Id.* at 30a.

Congress approved and codified the parties' agreement in the Settlement Act. Tracking the terms of the JMOU, the Settlement Act required the State to enact legislation to form a state-chartered corporation that was "to acquire, perpetually manage, and hold the settlement lands" and that was to be governed by a board of directors selected by the Tribe and the State. 25 U.S.C. § 1706(a)(1), (2). Congress mandated that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." *Id.* § 1708(a). It also extinguished the Tribe's aboriginal title to land

that it had transferred to other landowners (*id.* § 1705(a)(2)) and extinguished the right of the Tribe to make any "claims" "based upon any interest in or right involving such land," "including . . . claims for use and occupancy." *Id.* § 1705(a)(3). Congress discharged the United States from any "further duties or liabilities under [the Settlement Act] with respect to the [Tribe], the State Corporation, or the settlement lands." *Id.* § 1707(c).

The Tribe did not receive federal recognition until 1983. 48 Fed. Reg. 6177 (Feb. 10, 1983). After the Tribe obtained recognition, the Rhode Island General Assembly terminated the state-chartered corporation created for the purpose of holding the Settlement Lands and transferred those lands to the Tribe. R.I. Gen. Laws §§ 37-18-12, -13, -14. In 1988, the Tribe, in turn, deeded the Settlement Lands to the United States to be held in trust on its behalf. Pet. App. 12. Although the United States accepted the Tribe's conveyance of the Settlement Lands, it did so subject to the continued "applicability of state law conferred by the Rhode Island Indian Land Claims Settlement Act." J.A. 42a.

B. Procedural Background

1. In 1997, the Tribe submitted an application to the Bureau of Indian Affairs ("BIA") requesting that the Secretary take into trust on its behalf a 31-acre parcel of land in Charlestown that it owned in fee simple. Pet. App. 12. Although this 31-acre parcel was part of the 3,200 acres that the Tribe claimed in its 1975 lawsuits, it was not part of the 1,800 acres that the Tribe received through the settlement of those suits. *Id.* The Tribe acquired the 31-acre parcel—which is separated from the Settlement Lands by a town road—on the open market in 1991. *Id.*

The Tribe claimed that it would use the 31-acre parcel to construct low-income housing for its members (*id.*)—a project that could have been completed without a trust acquisition.

On March 6, 1998, the BIA notified the Governor and the Town that the Secretary had approved the trust application and intended to take the parcel into trust for the Tribe pursuant to his authority under Section 5 of the IRA. J.A. 45a. Because the proposed trust acquisition would divest the State of civil and criminal jurisdiction over the parcel—and, for the first time since Statehood, create sovereign Indian territory in Rhode Island—the Governor and the Town appealed the trust acquisition decision to the Interior Board of Indian Appeals ("IBIA"). The IBIA affirmed the Secretary's decision. *Id.* at 71a.

2. Petitioners sought review of the IBIA's decision in the United States District Court for the District of Rhode Island. Petitioners argued that the Secretary lacked the authority to acquire trust property for the Tribe because the Narragansetts—who were not federally recognized until 1983—were not "a[ ] recognized Indian tribe *now* under Federal jurisdiction" within the meaning of Section 19 of the IRA. 25 U.S.C. § 479 (emphasis added). They further argued that the Settlement Act had conclusively resolved the Tribe's land claims in Rhode Island and therefore foreclosed the trust acquisition.

The district court rejected both of these arguments and granted summary judgment to respondents. Pet. App. 136.

3. The First Circuit affirmed the district court's decision in a unanimous panel opinion. *Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005). After the State petitioned for rehearing, the three-judge panel with-

drew its opinion, and issued a new opinion that upheld the trust acquisition over a dissent from Judge Howard, who argued that the Settlement Act barred unrestricted trust acquisitions in Rhode Island. *Carcieri v. Norton*, 423 F.3d 35 (1st Cir. 2005).

The full court then reheard the case en banc and, in a 4-2 opinion, again upheld the Secretary's decision to take the 31-acre parcel into trust. Pet. App. 1. Although the en banc court acknowledged that "[o]ne might have an initial instinct to read the word 'now' in [Section 19 of the IRA] . . . to mean the date of enactment of the statute" (*id.* at 19)—which would exclude the Tribe from the IRA's scope—it concluded that "the word 'now' does not itself have a clear meaning" and could mean either at the time that the IRA was enacted or at the time that the Secretary invokes his trust authority. *Id.* at 20. In light of this perceived ambiguity, the court held that the Secretary's interpretation of Section 5 as authorizing trust acquisitions in favor of any tribe recognized and under federal jurisdiction at the time of the acquisition was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), and should be upheld as "reasonable" and "consistent with the language and legislative history of the IRA." Pet. App. 29.

The en banc court split as to whether the Settlement Act prohibits the Secretary from acquiring land in unrestricted trust for the Tribe. A four-judge majority concluded that "[t]here is . . . nothing in the text of the Settlement Act . . . that accomplishes . . . a repeal or curtailment of the Secretary's trust authority." Pet. App. 37. The majority reasoned that the provision of the Settlement Act extinguishing "all claims" by the Tribe "based upon any interest in or right involving . . . land" that it had transferred to

other landowners was limited to "claims based on the purported invalidity of those transfers." *Id.* at 41. The majority further held that "[t]rust acquisition is not incompatible with the extinguishment of aboriginal title" in the Settlement Act because the extinguishment of aboriginal title merely eliminated one "form of title" and did not preclude the reestablishment of tribal sovereignty over land by "alternative means," such as the acquisition of land in trust under the IRA. *Id.* at 42, 43.

In dissent, Judges Howard and Selya rejected the majority's "narrow" reading of the Settlement Act. Pet. App. 78 (Selya, J., dissenting). They argued that, through the Settlement Act, "Congress (and the parties) intended to resolve all the Tribe's land claims in the state once and for all," including claims raised in trust applications. *Id.* at 74 (Howard, J., dissenting). "[A]sking to have land taken into trust by the BIA under the IRA to effect an ouster of state jurisdiction," the dissenting judges explained, "is a quintessential 'Indian' land claim" foreclosed by the Settlement Act. *Id.* at 74-75. In their view, it was not "logical . . . to find that Congress enacted legislation effectuating [a] carefully calibrated compromise between three sovereigns . . . which provided for a delicate balancing of the parties' interests, only to permit the legislation to be completely subverted by subsequent agency action." *Id.* at 75. They also pointed to the anomalous result yielded by the majority opinion: that on the Settlement Lands—the heart of the Tribe's ancestral home—Congress requires that the Tribe be subject to the State's civil and criminal laws and jurisdiction while allowing the Secretary to grant the Tribe full territorial sovereignty anywhere outside of those lands. *Id.* at 77. That result, Judge Howard explained, "would be an-

tithetical to Congress' intent" in enacting the Settlement Act. *Id.* at 76.

SUMMARY OF ARGUMENT

Both the IRA and the Settlement Act prohibit the Secretary from acquiring the 31-acre parcel in trust for the Tribe.

I. The IRA generally restricts the Secretary's trust authority to those tribes that were both federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934—requirements that the Narragansetts indisputably fail to meet.

A.1. Section 19 of the IRA provides three alternative definitions of the "Indians" entitled to the statute's benefits. The definition on which the Secretary relied when approving the Narragansetts' trust application encompasses "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Congress's use of the phrase "recognized Indian tribe *now* under Federal jurisdiction" unambiguously excludes persons who are members of tribes that, like the Narragansetts, were not federally recognized and under federal jurisdiction when the IRA was enacted in 1934.

Interpreting the word "now" to refer to the time that the IRA is applied, rather than to the time it was enacted, would not only distort the plain meaning of the word, but also render its presence in Section 19 completely superfluous. Moreover, Congress consistently used the word "now" in the IRA to refer to the time of enactment (*see* 25 U.S.C. § 465), while using the phrase "now or hereafter" to refer to post-enactment developments. *See id.* §§ 468, 472. Because Section 19 refers to a "recognized Indian tribe now under Federal jurisdiction"—and not to a "rec-

ognized Indian tribe now or hereafter under Federal jurisdiction"—it restricts the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction in 1934.

2. This conclusion is confirmed by this Court's repeated holding that Congress uses the word "now" in a statute to refer to the time of enactment, not to the time of the statute's application. *See Montana v. Kennedy*, 366 U.S. 308, 312 (1961); *Franklin v. United States*, 216 U.S. 559, 569 (1910). Indeed, the Court has already determined that this longstanding rule of construction applies to the IRA, recognizing in *United States v. John*, 437 U.S. 634 (1978), that the IRA "defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized *[in 1934]* tribe now under Federal jurisdiction.'" *Id.* at 650 (quoting 25 U.S.C. § 479) (brackets in original; emphasis added).

3. The First Circuit's grounds for finding ambiguity in Section 19 are unpersuasive. The court of appeals was not able to point to any decision from this Court interpreting a statute's use of the word "now" to mean anything other than the time of enactment, relying instead on a lone circuit court decision construing a readily distinguishable statutory provision. Moreover, the court of appeals' suggestion that the relevant statutory context is "equivocal" overlooks both the fact that Congress consistently used the term "now" to refer to the date of enactment in the IRA (*see* 25 U.S.C. § 465) and the well-established proposition that identical words used in different parts of the same statute are presumed to have the same meaning.

B. The court of appeals' finding of ambiguity in Section 19 also disregards the structure and purpose

of the IRA. The IRA was enacted to end the federal government's allotment policy. In order to address the loss of tribal land attributable to that policy, Congress authorized the Secretary to acquire property in trust for tribes and individual Indians. It also carefully restricted the IRA's benefits, however, to those persons who could satisfy one of the definitions of "Indian" set forth in Section 19 of the IRA. That provision provides that everyone of Indian descent who is a member of a tribe that was federally recognized and under federal jurisdiction at the time of the IRA's enactment is entitled to the statute's benefits, while imposing more stringent definitional criteria on persons who cannot meet that standard. This distinction between members of tribes that were federally recognized and under federal jurisdiction in 1934 and all other persons claiming Indian status makes eminent sense because only those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment would have been subject to the allotment policy that the IRA was intended to remedy.

Because the Narragansetts were neither federally recognized nor under federal jurisdiction in 1934 and have never claimed to satisfy any of the IRA's alternative definitions of "Indian," the IRA does not authorize the Secretary to acquire land in trust on their behalf.

II. The Settlement Act imposes a separate and independent prohibition on the Secretary's acquisition of land in trust for the Tribe.

A. The Settlement Act was enacted to resolve two lawsuits that the Tribe filed seeking to recover land in the Town of Charlestown to which it claimed aboriginal title. To settle those suits, the State,

Town, and Tribe entered into a Joint Memorandum of Understanding that provided for the Tribe to recover 1,800 acres of the land that it claimed. In exchange for this land, the Tribe agreed that state law would continue to apply to that land and that federal legislation would be obtained that would retroactively approve its transfers of land to other landowners and extinguish its aboriginal title to that transferred property.

The Settlement Act gives effect to each of these terms, and also extinguishes "all claims . . . based upon any interest in or right involving . . . land" that the Tribe has transferred to other landowners, including "claims for use and occupancy" of that land. 25 U.S.C. § 1705(a)(3). The Tribe's trust application raises a quintessential "claim[ ] . . . based upon an[ ] interest in or right involving . . . land" because the trust application asserts a claim to territorial sovereignty over the 31-acre parcel that would oust the jurisdiction of the State and Town over that land. The Settlement Act squarely forecloses the Tribe from asserting, and the Secretary from granting, such claims.

B. The Secretary's acquisition of the parcel in trust for the Tribe would also undermine the objectives of the Settlement Act, which embodied a careful compromise between the sovereign interests of the State and Tribe. The Settlement Act balanced the Tribe's need for a land base against the State's sovereign interests by providing for the application of state law to the land that the Tribe received under the settlement agreement, extinguishing the Tribe's aboriginal title to all land that it had transferred to other landowners, and foreclosing the Tribe from asserting claims based on an interest in such land. If the Secretary nevertheless took the 31-acre parcel

into trust on behalf of the Tribe—and thereby created sovereign Indian territory in Rhode Island for the first time since Statehood—he would obliterate this statutory compromise by divesting the State of the sovereign rights that the Settlement Act was intended to secure against subsequent Indian land claims.

ARGUMENT

I. THE SECRETARY MAY NOT TAKE LAND INTO TRUST ON BEHALF OF THE NARRAGANSETTS BECAUSE THEY WERE NEITHER FEDERALLY RECOGNIZED NOR UNDER FEDERAL JURISDICTION IN 1934.

The First Circuit held that the IRA affords the Secretary the authority to take land into trust on behalf of the Narragansetts, even though the Tribe was neither federally recognized nor under federal jurisdiction at the time of the IRA's enactment. That conclusion is at odds with the text, structure, and purpose of the IRA, which (subject to two narrow exceptions inapplicable here) authorized the Secretary to take land into trust only on behalf of those tribes that were subject to the ill-advised policies of the General Allotment Act—*i.e.*, those tribes that were both federally recognized and under federal jurisdiction in 1934.

A. The Text Of The IRA Unambiguously Establishes That The Secretary Lacks The Authority To Take Land Into Trust On Behalf Of The Narragansetts.

1. Section 5 of the IRA provides that the Secretary may "acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing land *for Indians*." 25

U.S.C. § 465 (emphasis added). When the Secretary seeks to take land into trust on behalf of a tribe, he must therefore establish that the members of the tribe are "Indians" within the meaning of the IRA. Section 19 of the IRA provides that "[t]he term 'Indian' . . . shall include [1] all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood." *Id.* § 479 (emphasis and numbering added).

When the Secretary relies upon tribal membership—rather than descent or blood quantum—to establish that trust beneficiaries are "Indians" under the IRA, the plain language of Section 19—which encompasses "any recognized Indian tribe *now* under federal jurisdiction"—restricts the Secretary's trust authority to property acquired for persons who are members of tribes that were both federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934. The Secretary may not—through the promulgation of a regulation, or otherwise—expand his trust authority beyond this statutorily imposed boundary. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (internal quotation marks omitted); *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Dictionaries published shortly before, or contemporaneously with, the enactment of the IRA establish

that "now" means "at the present time" or, synonymously, "at the time of speaking." *See Webster's New International Dictionary of the English Language* 1671 (2d ed. 1939) ("At the present time; at this moment; at the time of speaking"); 6 *A New English Dictionary on Historical Principles* pt. II, at 244-45 (James A.H. Murray ed., 1908) ("At the present time or moment"; "In the time directly following on the present moment; immediately, forthwith"; "At this time; at the time spoken of or referred to"). By incorporating the term "now" into the phrase "recognized Indian tribe now under federal jurisdiction," Congress therefore restricted Section 19 of the IRA—and the scope of the Secretary's trust authority—to persons of Indian descent who are members of tribes that were federally recognized and under federal jurisdiction "at the time" Congress was "speaking"—*i.e.*, at the time of the IRA's enactment.[3]

In contrast, interpreting the word "now" to refer to the time that the IRA is applied, rather than to the time it was enacted, would render the term utterly superfluous. In the absence of an indication to the contrary, it is presumed that statutory criteria are measured at the time that the statute is applied.

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[3] As this Court recognized in *United States v. John*, 437 U.S. 634 (1978), this plain language interpretation of "now" applies with equal force to both the federal jurisdiction and federal recognition components of Section 19. *Id.* at 650; *see also infra* pg. 25. Indeed, it would make little sense for Congress to have established a definitional framework where the federal jurisdiction requirement is measured from the time of the IRA's enactment and the federal recognition requirement is evaluated at the time that the statute is invoked by the Secretary. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (a statute "is to be interpreted as a symmetrical and coherent regulatory scheme").

See De Lima v. Bidwell, 182 U.S. 1, 197 (1901). Thus, under the Secretary's reading of Section 19, the word "now" serves absolutely no function because, even if the word were removed from the statute, the statutory criteria would still be evaluated at the time of the statute's application—in direct contravention of the settled principle that statutes should be interpreted to give effect to each of their terms. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

The context in which the term "now" appears in Section 19 reinforces the conclusion that Congress intended for the definition of "Indian" to incorporate conditions at the time of the IRA's enactment. For example, one of the alternative definitions of "Indian" in Section 19 is persons who are "descendants of . . . members [of any recognized Indian tribe now under Federal jurisdiction] who were, on June 1, 1934, residing within the *present* boundaries of any Indian reservation." 25 U.S.C. § 479 (emphasis added). The "present boundaries" of an Indian reservation are the boundaries in place at the time of the IRA's enactment—not the boundaries at the time that the statute is invoked. *See Webster's New International Dictionary of the English Language*, *supra*, at 1955 (defining "present" as "now existing, . . . not past or future"). In light of Congress's pervasive focus in Section 19 on conditions at the time of the IRA's enactment—reflected in both the use of "present boundaries" and the June 1, 1934, limitation—it would be inconsistent with the immediate statutory context to interpret "any recognized Indian tribe now under Federal jurisdiction" to mean anything other than a tribe that was federally recognized and under federal jurisdiction at the time that the IRA was enacted.

The statutory provisions surrounding Section 19 of the IRA remove any conceivable doubt that Congress intended for its use of the term "now" to restrict the definition of "Indian"—and the Secretary's trust authority—to persons of Indian descent who are members of tribes federally recognized and under federal jurisdiction in 1934. Indeed, Congress used the term "now" in Section 5 itself—the provision that affords the Secretary his trust authority—to refer unambiguously to the time of the statute's enactment. *See* 25 U.S.C. § 465 ("*Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures *now* pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) . . . becomes law") (second emphasis added). Interpreting the use of "now" in Section 19 to mean anything other than the time of the statute's enactment would contradict the well-established presumption that "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan*, 496 U.S. at 484 (internal quotation marks omitted).[4]

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[4] This conclusion is reinforced by a provision that was added to the IRA after its initial enactment, which—like Sections 5 and 19—unambiguously uses the term "now" to refer to the time of enactment. *See* 25 U.S.C. § 484 ("From and after the date of the approval of this Act, each grant of exchange assignment of tribal lands on the Cheyenne River Sioux Reservation and the Standing Rock Sioux Reservation shall have the same force and effect, and shall confer the same rights, including all timber, mineral, and water rights *now* vested in or held by the Cheyenne River Sioux Tribe or the Standing Rock Sioux Tribe, upon the holder or holders thereof, that are conveyed by a trust

Conversely, Congress used the phrase "now or hereafter" in the IRA when it intended to encompass post-enactment developments. *See* 25 U.S.C. § 468 ("Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation *now* existing or established *hereafter*.") (emphasis added); *id.* § 472 ("The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, *now or hereafter*, by the Indian Office, in the administration of functions or services affecting any Indian tribe.") (emphasis added); *cf. id.* ("Such qualified Indians shall *hereafter* have the preference to appointment to vacancies in any such positions") (emphasis added).[5]

Because Section 19 refers to a "recognized Indian tribe now under Federal jurisdiction"—rather than "a recognized Indian tribe now or hereafter under Federal jurisdiction"—the provision's text and context unambiguously restrict the Secretary's trust au-

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patent issued pursuant to section 5 of the Act of February 8, 1887 . . . .) (emphasis added).

[5] A later-enacted provision of the IRA confirms that the statute uses the "now or hereafter" formulation when referring to post-enactment developments. *See* 25 U.S.C. § 475a ("In all suits *now* pending in the Claims Court by an Indian tribe or band which have not been tried or submitted, and in any suit *hereafter* filed in the Claims Court by any such tribe or band, the Claims Court is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band . . . .") (emphases added).

thority to tribes that were both federally recognized and under federal jurisdiction at the time that the IRA was enacted. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks and alterations omitted).[6]

2. This reading of Section 19 is confirmed by this Court's repeated holding that when Congress uses the word "now" in a statute, it is referring to the time of enactment—not to the time at which the statute is invoked.

In *Montana v. Kennedy*, 366 U.S. 308 (1961), for example, the Court held that a statute conferring citizenship on "children of persons who now are, or have been, citizens of the United States" applied only to children born to persons who were U.S. citizens at

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[6] Indeed, Congress is well-aware of how to draft a definition of "Indian" that encompasses tribes recognized either at the time of the statute's enactment or at some point in the future. *See* 25 U.S.C. § 1603(c) (the "terms ['Indians' or 'Indian'] shall mean any individual who . . . is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups . . . recognized *now or in the future* by the State in which they reside") (emphasis added). Congress included no such language in the IRA. Rather, when Congress has intended for the IRA to apply to tribes that were not federally recognized and under federal jurisdiction in 1934, it has enacted legislation explicitly extending the IRA to such tribes. *See, e.g.*, 25 U.S.C. § 1300b-14(a) ("The Act of June 18, 1934 (48 Stat. 984), is hereby made applicable to the [Texas] Band [of Kickapoo Indians] . . . ."); *id.* § 1300i-8(a)(2) ("The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 *et seq.*), as amended, is hereby made applicable to the Yurok Tribe . . . .").

the time of the statute's enactment in 1802. *Id.* at 312; *see also* Rev. Stat. § 2172 (reenacting Act of Apr. 14, 1802, ch. 28, 2 Stat. 153, 155). The Court explained that the statute "had no prospective application" and therefore did not grant citizenship to someone born abroad to a U.S.-citizen mother who had not yet been born in 1802. *Montana*, 366 U.S. at 311.

The Court reached the same conclusion when construing the Assimilative Crimes Act in *Franklin v. United States*, 216 U.S. 559 (1910). At the time, that statute provided "[t]hat when any offense is committed in any place, jurisdiction over which has been retained by the United States . . . the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall . . . be liable to and receive the same punishment as the laws of the State in which such place is situated *now* provide for the like offense when committed within the jurisdiction of such State." Act of July 7, 1898, ch. 576, 30 Stat. 717 (emphasis added). The Court concluded that, through its use of the term "now," Congress limited the Assimilative Crimes Act to those state laws that were in effect at the time of the statute's enactment. *Franklin*, 216 U.S. at 569; *see also United States v. Press Publ'g Co.*, 219 U.S. 1, 8 (1911) ("[T]he indictment was based on the Act of July 7, 1898, 30 Stat. 717, § 2. The effect of the act, as pointed out in *Franklin* v. *United States*, 216 U.S. 559, 568-569, was to incorporate the criminal laws of the several States in force on July 1, 1898, into the statute and to make such criminal laws to the extent of such incorporation laws of the United States.").[7]

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[7] It is also probative that, in 1948, when Congress decided to amend the Assimilative Crimes Act to incorporate any state law

Consistent with this unbroken line of precedent, this Court has construed the definition of "Indian" in Section 19 of the IRA as limited to persons of Indian descent who are members of tribes that were federally recognized and under federal jurisdiction in 1934. In *United States v. John*, 437 U.S. 634 (1978), the Court concluded that the Choctaw Indians' Mississippi reservation satisfied the federal statutory definition of "Indian country" because the Choctaws possessed one-half or more Indian blood. *Id.* at 650. In so holding, the Court explained that "[t]he 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized *[in 1934]* tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'" *Id.* (quoting 25 U.S.C. § 479) (alteration in original; emphasis added). The bracketed phrase "in 1934" that the Court inserted into

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[Footnote continued from previous page]

in force at the time of the defendant's conduct—rather than merely those state laws that were in effect at the time of the statute's enactment—it did so by deleting the word "now" and replacing it with the phrase "laws thereof in force at the time of such act or omission"—language that unambiguously refers to a time *after* the statute's enactment. *See* 18 U.S.C. § 13(a) ("Whoever within or upon any of the places now existing or hereafter reserved or acquired . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense . . . ."). Congress has made no comparable revision to the IRA to extend the Secretary's trust authority to tribes federally recognized and under federal jurisdiction at the time the Secretary invokes that authority.

the language of Section 19 reflects the Court's understanding that the word "now" restricts the operation of the IRA to tribes that were federally recognized and under federal jurisdiction at the time of enactment.[8]

Moreover, before the First Circuit's holding in the decision below, *every* other appellate court to have addressed the issue had reached the same conclusion. *See United States v. Miss. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe *now* under Federal jurisdiction' and the additional language to like effect.") (emphasis in original); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) ("[B]y its terms, the [IRA] did not include any native Hawaiian group. There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were

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[8] The First Circuit dismissed this language in *John* as "fall[ing] short even of being dicta." Pet. App. 23. While the Court's holding in *John* did not turn upon whether it was necessary for the Choctaw Indians to be federally recognized and under federal jurisdiction in 1934 to qualify for the IRA's benefits, the Court clearly considered the fact that the Choctaws did not satisfy these conditions as part of its analysis. Indeed, the Fifth Circuit had relied upon that fact to hold that the Choctaws' reservation was not "Indian country." *See United States v. John*, 560 F.2d 1202, 1212 (5th Cir. 1977). Instead of reversing the Fifth Circuit's decision on the ground that the court of appeals erred by requiring the tribe to be federally recognized and under federal jurisdiction in 1934 to be subject to the IRA, the Court relied upon the alternative "half blood" definition to conclude that the tribe was covered by the IRA. The issue whether the IRA is limited to tribes that were federally recognized and under federal jurisdiction in 1934 was therefore squarely before the Court in *John*.

there any reservations in Hawaii."). The "strength of this consensus is enough to rule out any serious claim of ambiguity" regarding the definition of "now" in Section 19 of the IRA. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004).

3. The First Circuit failed to provide a persuasive basis for its finding of ambiguity in Section 19.

The court of appeals suggested that Section 19 is ambiguous because "Congress sometimes uses the word 'now' to refer to a time other than the moment of enactment." Pet. App. 20. While the First Circuit is correct that Congress, on rare occasion, has used "now" to that effect in statutes other than the IRA, the lone federal decision that the court of appeals was able to muster in support of this proposition construed a statute in which it would have been nonsensical to read the term "now" as referring to the time of enactment. *See Difford v. Sec'y of Health & Human Servs.*, 910 F.2d 1316, 1320 (6th Cir. 1990) (construing the term "now" in 42 U.S.C. § 423(f), a Social Security procedural rule providing that benefits can be terminated at a hearing only where there is substantial evidence that "the individual is now able to engage in substantial gainful activity").[9] The text

[9] The court of appeals also cited two state court decisions interpreting provisions of state law. *See Pierce v. Pierce*, 287 N.W.2d 879, 882 (Iowa 1980) (construing a provision of Iowa law providing that, "[i]f a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction"); *Williams v. Ragland*, 567 So. 2d 63, 66 (La. 1990) (construing the term "now" in a state constitution to refer to other than the time of enactment because a constitution is "a continuing instrument of government, which must endure an indefinite future on a daily basis") (internal quotation marks omitted).

and context of Section 19, in contrast, leave no doubt that Congress used the term "now" to refer to the date on which the IRA was enacted.

The court of appeals further contended that the statutory context in which Section 19 appears is "equivocal." Pet. App. 20. Despite Congress's use of the "now or hereafter" formulation in other provisions of the IRA to encompass post-enactment developments, the court of appeals found ambiguity in the fact that Section 19 establishes "the date of 'June 1, 1934' as the relevant date for determining eligibility based on 'residing within the present boundaries of any Indian reservation.'" *Id.* Congress's use of a specific date in Section 19 suggested to the court of appeals that Congress might have used the specific date of the IRA's enactment, June 18, 1934, rather than the term "now," if it had wanted to restrict the definition of "Indian" to persons of Indian descent who were members of tribes that were federally recognized and under federal jurisdiction at the time of enactment. *Id.* at 20-21. But it is beyond dispute that, in at least one other section of the IRA, Congress used the term "now"—rather than "June 18, 1934"—to refer to the date of the statute's enactment. *See* 25 U.S.C. § 465 (referring to "measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927)"). Because "identical words used in different parts of the same statute are generally presumed to have the same meaning" (*IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)), there is no reason to think that Congress would have used a specific date in Section 19—rather than the term "now," as it did in other provisions of the IRA—to reference the date of enactment. Indeed, June 1, 1934—the date on which the First Circuit placed so much weight—is *not* the date on which the IRA was enacted, which

explains Congress's reference to that specific date rather than to the term "now" in defining the class of persons who can claim Indian status based on descent.[10]

B. The Structure And Purpose Of The IRA Confirm That The Secretary Cannot Take Land Into Trust On Behalf Of The Narragansetts.

The court of appeals deemed it "plausible" that, as the Secretary contends, "it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934." Pet. App. 21. But, when viewed in light of the congressional objectives that animate the IRA and the statutory structure that Congress established to ac-

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[10] The First Circuit also cited 25 U.S.C. § 478, which imposed upon the Secretary the duty "within one year after June 18, 1934, to call" elections by existing reservation Indians on whether to opt out of the IRA's coverage. 25 U.S.C. § 478. As an initial matter, it would have been grammatically awkward for Congress to have used the term "now" instead of the date "June 18, 1934," in this provision. More importantly, Congress's failure to provide any means for later-recognized tribes to opt out of the IRA's coverage provides further indication that the IRA was intended to benefit only those Indians federally recognized at the time of passage. The First Circuit dismissed this consideration on the ground that "it is difficult to see why any tribe would opt out of a statute designed to benefit it." Pet. App. 28 n.7. The IRA was highly controversial, however, at the time it was enacted, and some tribes did indeed vote to opt out of its application. *See, e.g., United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980). Congress was well aware of the controversial nature of the IRA (*see* IRA Legislative History, *supra*, at 1987), which makes it all the more improbable that, if the IRA applied to tribes that were not recognized and did not fall under federal jurisdiction until after its enactment, Congress would have restricted the opt-out right to tribes able to hold an election by June 1935.

complish those objectives, this distinction makes eminent sense.

1. The IRA was designed to "repudiate[ ] the practice of allotment" by putting an end to further individual allotments of tribes' reservation land and by providing land for those tribes and individual Indians that had lost their property under the General Allotment Act. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001); *see also* IRA Legislative History, *supra*, at 1916 (Letter from Commissioner Collier to Sen. Copeland) ("The enormous importance of the bill is for those Indians . . . who have been rendered landless by the allotment system."). The Secretary's authority to take land into trust "for the purpose of providing land for Indians" was a central component of Congress's effort to remedy the loss of land attributable to the allotment policy. 25 U.S.C. § 465; *see also* IRA Legislative History, *supra*, at 1960 (statement of Rep. Howard) ("The Indians now landless must be provided for. [Section 5] undertakes to do this gradually through an annual appropriation for the purchase of land.").

It was also necessary, however, that "the line . . . be drawn somewhere" in defining the class of beneficiaries entitled to have land taken into trust on their behalf. IRA Legislative History, *supra*, at 1973 (statement of Rep. Howard). In Section 19 of the IRA, Congress accomplished this line-drawing by establishing three classes of "Indians" entitled to the IRA's benefits. First, a person is an "Indian" within the meaning of the IRA if he is "of Indian descent"—regardless of his quantum of Indian blood—and is a member of a tribe that was federally recognized and under federal jurisdiction at the time of the IRA's enactment. Second, a person is an "Indian" if he was living on an Indian reservation on June 1, 1934, and

is a descendant of a person of Indian descent who was a member of a tribe that was federally recognized and under federal jurisdiction at the time of the IRA's enactment. Third, if a person is unable to demonstrate the requisite connection to a tribe that was federally recognized and under federal jurisdiction in 1934, he can still qualify for benefits under the IRA if he can establish that he is of "one-half or more Indian blood."

The IRA therefore provides that everyone of Indian descent who is a member of a tribe that was federally recognized and under federal jurisdiction at the time of the IRA's enactment is entitled to the statute's benefits, but imposes more stringent definitional criteria on persons who cannot make that showing—requiring that they demonstrate either that they are a descendant of such a person and were living on an Indian reservation on June 1, 1934, or that they possess one-half or more Indian blood. This definition of "Indian" makes perfect sense in light of Congress's intention that the IRA serve primarily as a remedy for the harm that tribes suffered under the allotment policy. The definition ensured that all persons who were members of tribes that lost land due to allotment could benefit from the IRA's provisions, while imposing a higher eligibility threshold on persons who were not members of such tribes.

Indeed, *only* those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment would have lost reservation land as a result of the allotment policy because only those tribes would have possessed federally recognized reservations subject to allotment by the federal government. If the federal government had ordered the allotment of a tribe's reservation land, then the

tribe would necessarily have been under federal jurisdiction. *See, e.g.*, Act of Mar. 3, 1921, ch. 135, 41 Stat. 1355, 1355 (providing for allotment of the Fort Belknap Reservation); Act of June 30, 1919, ch. 4, 41 Stat. 3, 16 (providing for allotment of the Blackfeet Indian Reservation). On the other hand, if a tribe was not under federal jurisdiction, then it could not have been subject to the policies of the General Allotment Act.

2. The legislative history of the IRA confirms that, subject to the two definitional exceptions not at issue in this case, Congress intended to restrict the statute's benefits to those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment.

An exchange between Senator Wheeler, the Senate sponsor of the IRA, and Commissioner of Indian Affairs John Collier during a hearing on the IRA confirms that the word "now" was added to the definition of "Indian" in Section 19 to limit the first of the three alternative definitions to persons who were members of tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment. During the hearing, Senator Wheeler suggested that the benefits of the IRA should be restricted to persons who had a legitimate claim to Indian status. *See To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. 266 (1934) (statement of Sen. Wheeler) ("I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called 'tribes' there. They are no

more Indians than you or I, perhaps .... And yet they are under the supervision of the Government of the United States ...."). In response, Commissioner Collier suggested that the term "now" be inserted into the definition of "Indian," explaining, "Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? *That would limit the act to the Indians now under Federal jurisdiction*, except that other Indians of more than one-half Indian blood would get help." *Id.* (emphasis added); *see also* IRA Legislative History, *supra*, at 1972 (statement of Rep. Howard) (the definition of "Indian" "recognizes the status quo of the present reservation Indians").

In light of this exchange regarding the origins of the word "now" in Section 19 of the IRA, it is beyond reasonable dispute that Congress added the word "now" to that provision to "limit the act to the Indians" under federal jurisdiction at the time of the statute's enactment. The First Circuit nevertheless read this legislative history as creating the possibility that "the phrase 'now under [F]ederal jurisdiction' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent'"—that is, that the word "now" was added "to grandfather in those individuals already receiving federal benefits." Pet. App. 25-26 (emphasis omitted).

No party endorsed such a reading of the statutory language below—and with good reason. The phrase "now under Federal jurisdiction" directly follows "any recognized Indian tribe" in Section 19. The First Circuit's suggestion that the phrase modifies anything other than the immediately preceding language is at odds with the "grammatical rule of the last antecedent, according to which a limiting clause or phrase ... should ordinarily be read as modifying

only the noun or phrase that it immediately follows." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (alteration in original; internal quotation marks omitted).

* * *

The Narragansett Tribe's members do not satisfy any of the three alternative definitions of "Indian" under Section 19 of the IRA. It is undisputed that the Narragansett Tribe was neither federally recognized nor under federal jurisdiction at the time of the IRA's enactment in 1934. J.A. 21a-23a; Recommendation, *supra*, at 8. Moreover, the Narragansetts have never claimed that they were living on a federal reservation on June 1, 1934, and are descendants of persons who were members of a tribe that was federally recognized and under federal jurisdiction in 1934, or that they are of one-half or more Indian blood. The Secretary therefore may not use his trust authority to take land into trust on behalf of the Narragansetts because that authority may be used only "for the purpose of providing land for Indians." 25 U.S.C. § 465.

Excluding the Narragansetts from the reach of the Secretary's trust authority is consistent with the congressional objectives that animate the IRA. The Narragansetts did not possess a federal reservation in Rhode Island at the time that the United States was allotting reservation land under the General Allotment Act. Because the Narragansetts did not lose land as a result of the allotment policy, Congress would not have intended for the Tribe to benefit from the trust authority that was delegated to the Secretary to provide land for Indians who had lost their property through allotment. There is accordingly no basis in the language or purpose of the IRA for the

Secretary to displace the State's criminal and civil jurisdiction over the 31-acre parcel by taking that property into trust on behalf of the Narragansetts.

II. THE SETTLEMENT ACT PROHIBITS THE SECRETARY FROM TAKING THE 31-ACRE PARCEL INTO TRUST ON BEHALF OF THE NARRAGANSETTS.

Even if the Secretary did possess authority under Section 5 of the IRA to take land into trust on behalf of a tribe that was neither federally recognized nor under federal jurisdiction at the time of the IRA's enactment, the Rhode Island Indian Claims Settlement Act would prohibit the Secretary from exercising that authority in connection with the 31-acre parcel claimed by the Narragansetts. The Settlement Act extinguishes all claims regarding land that the Tribe has transferred to other landowners—including claims to territorial sovereignty asserted through the trust process. Because the Tribe acknowledges that it transferred the 31-acre parcel more than a century ago, the Settlement Act forecloses the Secretary from granting the Tribe's claim to sovereignty over that land.

The First Circuit's contrary conclusion conflicts with the plain language of the Settlement Act and is fundamentally at odds with the careful balance between state and tribal sovereign interests negotiated by the parties to the JMOU and codified in the Settlement Act.

A. The Plain Language Of The Settlement Act Prohibits The Narragansetts From Asserting Claims To Sovereignty Over The 31-Acre Parcel.

1. In the 1975 lawsuits that gave raise to the Settlement Act, the Tribe claimed that, from "time immemorial," it had possessed aboriginal title to 3,200 acres of land in the Town of Charlestown. *S. R.I. Land Dev. Corp.* Compl. ¶ 1. The Tribe alleged that its transfer of that property to other landowners had not been approved by Congress and therefore violated the Indian Trade and Intercourse Act of 1790, 25 U.S.C. § 177. *S. R.I. Land Dev. Corp.* Compl. ¶¶ 12, 71. Through these suits, the Tribe sought to eject the non-Indian landowners from this property and recover monetary damages from the State, Town, and private defendants.

The parties resolved these two suits by entering into a Joint Memorandum of Understanding that was intended to "settle[ ] . . . Indian land claims within the State of Rhode Island." J.A. 25a. Under the terms of the JMOU, the Tribe recovered 1,800 of the 3,200 acres of land to which it claimed aboriginal title. *Id.* at 26a. The JMOU made clear that, subject to certain narrow exceptions for hunting and fishing regulations (*id.* at 28a), "all laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands, including but not limited to state and local building, fire and safety codes." *Id.* In exchange for the recovery of this land, the Tribe agreed to retroactive congressional approval of every transaction in which it had transferred its aboriginal land to other landowners and to the extinguishment of any aboriginal title that it possessed to those transferred lands. *Id.* at 37a.

The Settlement Act gave effect to each of these conditions in order "to resolve once and for all the claims being asserted by the Narragansett Indians to lands in the Town of Charlestown." H.R. Rep. 95-1453, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1958. In addition to facilitating the acquisition of the agreed-upon 1,800 acres and making clear that state law would continue to apply to that property (25 U.S.C. §§ 1707(a), 1708(a)), the Settlement Act provided congressional authorization for every transaction in which the Tribe had transferred its land. To that end, the Settlement Act provides that "any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the [Tribe] . . . shall be deemed to have been made in accordance with the Constitution and all laws of the United States." *Id.* § 1705(a)(1). The Settlement Act further states that, "to the extent that any [such] transfer of land or natural resources . . . may involve land or natural resources to which the [Tribe] . . . had aboriginal title, subsection (a) [of Section 1705] shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer." *Id.* § 1705(a)(2). Finally, in order to foreclose all future claims regarding this transferred land, the Settlement Act provides that

> by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stock-

> holder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

Id. § 1705(a)(3). Section 1712 of the Settlement Act extended these retroactive approval and extinguishment provisions to every other Indian tribe's transfer of land within Rhode Island. *Id.* § 1712(a); *see also id.* § 1705(a) (extinguishing other tribes' claims to land in Charlestown).

Together, these provisions provide retroactive congressional authorization for all Indian land transfers in Rhode Island, extinguish all aboriginal title to the transferred land, and foreclose tribes from asserting claims based upon transferred land. The resulting statutory framework embodies a careful compromise between the sovereign interests of the State and Tribe that provides the Tribe with a land base while ensuring that state law will continue to apply to all Indian lands in Rhode Island.

2. The claims extinguishment provision of the Settlement Act is an essential component of this statutorily embodied compromise and was designed to "eliminate[] all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." J.A. 27a; *see also* 25 U.S.C. § 1705(a)(3). That provision prohibits the Secretary from taking the 31-acre parcel into trust on behalf of the Tribe.

The claims extinguishment provision "extinguish[es] . . . all claims . . . based upon any interest

in or right involving . . . land" that the Tribe has transferred to other landowners. 25 U.S.C. § 1705(a)(3). It is undisputed that, before the European settlement of Rhode Island, the Tribe "owned, used, and occupied" the 31-acre parcel and that the Tribe thereafter transferred the parcel. *S. R.I. Land Dev. Corp.* Compl. ¶ 7; *see also id.* ¶ 69 (describing the parcel and seeking to eject the then-current landowners). The Tribe's request that the Secretary now take the 31-acre parcel into trust on its behalf is a quintessential "claim[ ] . . . based upon an[ ] interest in or right involving such land" because the Tribe's trust application asserts a claim to territorial sovereignty over the land that would divest the State and Town of their jurisdiction over the property. *See Black's Law Dictionary* 240 (7th ed. 1999) (defining "claim" as any "demand for money or property to which one asserts a right"); *see also De Coteau*, 420 U.S. at 428 ("Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities"); 25 C.F.R. § 1.4. Indeed, the claims extinguishment provision expressly applies to "claims for use and occupancy" of land (25 U.S.C. § 1705(a)(3)), which necessarily encompass claims for sovereign use and occupancy. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 690 (1993) (a tribe's "right . . . of 'absolute and undisturbed use' . . . encompass[es] the right to exclude and to regulate"); *Montana v. United States*, 450 U.S. 544, 559 (1981) (where tribe possessed "absolute and undisturbed use and occupation" over land, it could exercise regulatory jurisdiction over that land) (emphasis omitted). Because the Tribe's claim to sovereign rights over the 31-acre parcel falls squarely within the terms of the Settlement Act's claims extinguishment

provision, the Secretary is prohibited from granting the Tribe's claim through the approval of its trust application.

The First Circuit misread the Settlement Act when it concluded that the statute did not extinguish the Tribe's claim to sovereignty over the 31-acre parcel. As an initial matter, the First Circuit was incorrect to suggest that petitioners' "argument . . . depends on finding that the Settlement Act *implicitly* repealed the IRA, at least in part." Pet. App. 38-39 (emphasis in original). The Settlement Act *explicitly* forecloses the Secretary from exercising that authority in connection with land that the Narragansetts have transferred to other landowners through its provision extinguishing tribal "claims . . . based upon an interest in or right involving . . . land," including "claims for use and occupancy." This Court's decisions restricting the circumstances in which a statute will be deemed to have been impliedly repealed are therefore wholly inapplicable to this case.

The First Circuit also suggested that petitioners' "interpretation of paragraph (3)" of Section 1705(a) as extinguishing the Tribe's claims based on transferred land "proves too much" because it would "prevent the Tribe from asserting any ownership interest over land it purchased" on the open market. Pet. App. 43, 44. The JMOU, however, expressly forecloses this reading of the Settlement Act. *See* J.A. 27a ("This legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island."). Moreover, Congress explained at the time of the Settlement Act's enactment that "extinguishment of Indian land claims is limited to those claims raised by Indians qua Indians, and is not intended to affect or

eliminate the claim of any Indian under any law generally applicable to Indians as well as non-Indians." H.R. Rep. 95-1453, at 12, *reprinted in* 1978 U.S.C.C.A.N. at 1955. Indeed, it would be absurd to read the Settlement Act as precluding an Indian tribe that holds land in fee simple from bringing state-law trespass and property damage causes of action available to non-Indian landowners. *See Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988) ("courts should strive to avoid attributing absurd designs to Congress").

The First Circuit further contended that, even if the Settlement Act did impose restrictions on the Tribe's ability to assert claims regarding the 31-acre parcel, those restrictions are inapplicable to the Secretary. *See* Pet. App. 44 ("this entire line of argument by the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do") (emphases in original). But the provision of the Settlement Act extinguishing the Tribe's right to assert claims to territorial sovereignty over transferred land necessarily forecloses the Secretary from exercising his trust authority to grant such claims, just as it prohibits a court from awarding relief to the Tribe on a statutorily barred claim. If that were not the case, the provision would be an absolute nullity. Indeed, under the First Circuit's reasoning, the Secretary would still be able to acquire land in trust for the Tribe if the Settlement Act emphatically stated that "the Narragansett Tribe is prohibited from requesting that land be taken into trust on its behalf." Such excessive literalism defies common sense and undermines Congress's reasonable expectations when enacting the Settlement Act. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (cautioning against an

"uncritical literalism" in statutory interpretation) (internal quotation marks omitted).

Moreover, the claims extinguishment provision applies not only to the Tribe but also to any "successor in interest" to the Tribe. 25 U.S.C. § 1705(a)(3). Because the Secretary becomes the successor in fee title interest to the Tribe when he takes land into trust on its behalf, he is bound by the Settlement Act's extinguishment provision.[11]

B. The Secretary's Acquisition Of The 31-Acre Parcel In Trust For The Narragansetts Would Undermine The Objectives Of The Settlement Act.

The JMOU to which the State, Town, and Tribe agreed in order to settle the Tribe's two lawsuits provided that "Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in

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[11] The First Circuit also placed weight on the fact that, "[i]n other settlement acts, Congress has specifically described limits on the Secretary's trust authority," but did not explicitly reference that trust authority in the Settlement Act. Pet. App. 47. It was necessary, however, for Congress to make explicit reference to the Secretary's trust authority in the two settlement acts cited by the court of appeals because those acts preserved the Secretary's authority to acquire land in trust for the relevant tribes, subject to certain statutorily imposed restrictions. *See* Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(e); Connecticut Indian Land Claims Settlement Act, *id.* § 1754(b)(8). The Rhode Island Settlement Act, in contrast, categorically precludes the Secretary from exercising his trust authority in connection with land transferred by the Tribe. *Id.* § 1705(a)(3). Unlike in the Maine and Connecticut acts, then, it was unnecessary for Congress to define the specific contours of the Secretary's trust authority in the Rhode Island act.

Rhode Island." J.A. 27a. It would be inconsistent with the intentions of the parties to the JMOU and the congressional objectives embodied in the Settlement Act—the "Federal legislation" for which the JMOU provided—to authorize the Secretary to use his trust authority to divest the State and Town of jurisdiction over the 31-acre parcel.

1. The Settlement Act establishes a compromise between the sovereign interests of the State and Tribe. This careful allocation of competing sovereign interests is evident in several provisions of the statute.

First, the Settlement Act balances the Tribe's need for a land base against the State's interest in maintaining sovereignty over its land by providing for the transfer of 1,800 acres of land to the Tribe, while making clear that, with several minor exceptions, "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State." 25 U.S.C. § 1708(a).

Second, Congress foreclosed future tribal claims seeking to recover possession or sovereignty over previously alienated land by ratifying all transactions in which Indian tribes had transferred land within Rhode Island (25 U.S.C. §§ 1705(a)(1), 1712(a)(1)), and extinguishing any claims that the tribes may have "based upon any interest in or right involving such land." *Id.* §§ 1705(a)(3), 1712(a)(3).

Third, Congress extinguished all tribes' aboriginal title to land in Rhode Island that they had transferred to other landowners. The Settlement Act thereby ensures that no tribe may rely upon the sovereign rights associated with aboriginal title to restrict the State's jurisdiction over its land. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation*, 544 U.S.

197, 213 (2005) (noting the argument of the United States and the Oneidas that the unification of fee title and aboriginal title permits the exercise of tribal "sovereign dominion").

The Secretary's acquisition of land in Rhode Island in trust for the Tribe—and the resulting ouster of state jurisdiction over that land—is incompatible with this statutory framework, which provides a land base for the Tribe, while preserving the State's sovereignty over the Tribe's territory. If the Secretary were able to exercise his trust authority in the State to create sovereign Indian territory, he would be able to alter and, ultimately, undermine the fundamental allocation of sovereignty that Congress established in the Settlement Act. *See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (courts do not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other") (internal quotation marks omitted).

Moreover, permitting the Secretary to acquire the 31-acre parcel in trust would prevent the State from applying its laws uniformly throughout its territory—a congressional objective reflected in the provision of the Settlement Act subjecting the Settlement Lands to state law. 25 U.S.C. § 1708(a). Indeed, creating enclaves of Indian country within the densely populated State would create significant administrative problems for the State and greatly complicate efforts to enforce its laws within its territorial boundaries.

Finally, reading the Settlement Act to permit the Secretary to take land into trust for the Tribe would mean that the Tribe would be free to exercise territorial sovereignty over land *anywhere* in the State, *except* on the Settlement Lands—which are the heart

of the Tribe's ancestral home. Neither Congress nor the parties to the JMOU could have intended such an anomalous result.

2. Congress's intent that the Settlement Act foreclose trust acquisitions in Rhode Island is confirmed by the fact that the statute was modeled on—and closely resembles—the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*; H.R. Rep. 95-1453, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 1951, a measure that the United States itself acknowledges is a prohibition on subsequent trust acquisitions in Alaska. *See* U.S. Dep't of the Interior Solicitor Op. M-36975, at 107-08, 123 n.296 (Jan. 19, 1993) (concluding that "it would be an abuse of discretion for the Secretary to take lands in trust" in Alaska because ANCSA "contains a very complete address to the issue of land," which left "little or no room for tribes in Alaska to exercise governmental authority over land").

In ANCSA, Congress revoked the existing native land reserves in Alaska and transferred fee-simple title to approximately 44 million acres of Alaska land to state-chartered private business corporations comprised of Alaska Natives. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 524 (1998). This Court held in *Venetie* that land acquired under ANCSA did not constitute "Indian country" over which the Alaska Natives could exercise sovereignty. The Court found the following factors to be dispositive in reaching this conclusion:

* ANCSA was a comprehensive statute designed to settle all land claims by Alaska Natives. *Id.* at 523.

* In enacting ANCSA, "Congress sought to end the sort of federal supervision over Indian affairs

that had previously marked federal Indian policy." *Id.* at 523-24.

* ANCSA extinguished all aboriginal claims to land in Alaska. *Id.* at 524.

* Federal funds and land were transferred by the federal government to state-chartered private business corporations, formed pursuant to state statute. All of the shareholders of these corporations were Alaska Natives. *Id.*

* ANCSA corporations received title to these lands in fee simple, without the application of a federal restraint on alienation. *Id.*

* The state-chartered corporation at issue ultimately transferred title to fee land to the tribal government. *Id.*

The same factors that led this Court to conclude that Congress intended to disestablish Indian country in Alaska are present in the Rhode Island Settlement Act:

* The Settlement Act was a comprehensive measure designed to settle all tribal claims to land in Rhode Island. 25 U.S.C. § 1705(a)(2), (a)(3); *id.* § 1712(a)(2), (a)(3).

* In enacting the Rhode Island Settlement Act, Congress specifically provided that the Secretary would have no further land-based duties or liabilities to the Tribe. *Id.* § 1707(c).

* The Rhode Island Settlement Act extinguished all aboriginal claims to land in Rhode Island. *Id.* §§ 1705(a)(2), 1712(a)(2).

* The Settlement Lands were transferred to a state-chartered corporation formed pursuant to state statute. *Id.* § 1707(a). The majority of members of

the corporation's board were selected by the Tribe. *Id.* § 1706(a)(1), (a)(2).

* The corporation received the Settlement Lands in fee simple with no initial restraint on alienation. *Id.* § 1707(c).

* The corporation ultimately transferred the land to the Tribe itself. Pet. App. 11-12.

By providing the Tribe with a land base through a state-chartered corporation, extinguishing tribes' aboriginal title to, and claims based upon, any transferred land, and disavowing further federal duties or liabilities in connection with the Tribe, Congress established in Rhode Island precisely the allocation of sovereign powers between the State, federal government, and tribes that it created in Alaska. As with ANCSA, the Secretary's acquisition of land in trust in Rhode Island would be fundamentally inconsistent with Congress's carefully calibrated balance between state and tribal interests.

* * *

Sovereign Indian territory has never existed in the State of Rhode Island. Through its trust application, the Tribe nevertheless claims the right to exercise sovereignty over 31 acres of land in Charlestown and to divest the State and Town of jurisdiction over that property. The Secretary's decision to grant the Tribe's claim conflicts with the express limitations that the IRA imposes on his trust authority and obliterates the delicate compromise between state and tribal sovereign interests embodied in the Settlement Act. The Secretary may not disregard the congressionally imposed restrictions on his trust authority or assist the Tribe in evading the settlement

that provided a definitive resolution to all Indian land claims in Rhode Island.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CLAIRE RICHARDS
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Donald L. Carcieri

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APPENDIX

The Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, provides in relevant part:

§ 461. Allotment of land on Indian reservations

Hereafter, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

§ 463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) Papago Indian; permits for easements, etc.

(1) [Repealed]

(2) [Repealed]

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided*, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: *Provided further*, That the appropriation of living water heretofore or hereafter affected by the Papago Indians is hereby recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

* * *

§ 464. Transfer of restricted Indian lands or shares in assets of Indian tribes and corporations; exchange of lands

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or

shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not

to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration,

to prevent soil erosion, to assure full utilization of the range, and like purposes.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

§ 468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

§ 470. Revolving fund; appropriation for loans

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established

as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

* * *

§ 471. Vocational and trade schools; appropriation for tuition

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified

Indians shall hereafter have the preference to appointment to vacancies in any such positions.

* * *

§ 473. Application generally

The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 [25 USCS §§ 469, 470, 471, 472, and 476], shall apply to the Territory of Alaska: *Provided*, That sections 4, 7, 16, 17, and 18 of this Act [25 USCS §§ 464, 467, 476, 477, and 478] shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawanee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act [25 USCS § 464] shall not apply to the Indians of the Klamath Reservation in Oregon.

* * *

§ 474. Continuance of allowances

The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat. L. 451), or under any prior Act, and who have the pre-

scribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act [enacted June 18, 1934] would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

§ 475. Claims or suits of Indian tribes against United States; rights unimpaired

Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

§ 475a. Offsets of gratuities

In all suits now pending in the Claims Court [Court of Federal Claims] by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Claims Court [Court of Federal Claims] by any such tribe or band, the Claims Court [Court of Federal Claims] is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended

gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Claims Court [Court of Federal Claims] in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Claims Court [Court of Federal Claims] is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: *Provided,* That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act [25 USCS § 465], shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Claims Court [Court of Federal Claims] or hereafter filed: *Provided further,* That funds appropriated and expended from tribal funds shall not be construed as gratuities; and this section shall not be deemed to amend or affect the various Acts granting jurisdiction to the Claims Court [Court of Federal Claims] to hear and determine the claims listed on page 678 of the hearings before the subcommittee of the House Committee on Appropriations on the second deficiency appropriation bill for the fiscal year 1935: *And provided further,* That no expenditure under any emergency appropriation or allotment made subsequently to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution

of public works and public projects for the relief of unemployment or to increase employment, and for work relief (including the civil-works program) shall be considered in connection with the operation of this section.

§ 476. Organization of Indian tribes; constitution and by-laws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a)—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act [enacted May 31, 1994] and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and per-

sonal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

§ 478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

* * *

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words

"adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

* * *

The Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, provides:

§ 1701. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

§ 1702. Definitions

For the purposes of this Act [25 USCS §§ 1701 et seq.], the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C. A. No. 75-0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C. A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 5 and 8 of this Act [25 USCS §§ 1704 and 1707];

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 7 of this Act [25 USCS § 1706];

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 7 of this Act [25 USCS § 1706]; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

§ 1703. Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 11 of this Act [25 USCS § 1710].

§ 1704. Option agreements to purchase private settlement lands

(a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee

for the purchase of the private settlement lands: *Provided*, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 4 [25 USCS § 1703]. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Amount of payment

Payment for any option entered into pursuant to subsection (a) shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 4 of this Act [25 USCS § 1703].

(c) Limitation on option fees

The total amount of the option fees paid pursuant to subsection (b) shall not exceed $175,000.

(d) Application of option fee

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) Retention of option payment

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

§ 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 7 of this Act [25 USCS § 1706], he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, [unclassified] and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest,

member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to section 6 [this section], bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed

in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

§ 1706. Findings by Secretary

Section 6 of this Act [25 USCS § 1705] shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

§ 1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 7(a) [25 USCS § 1706(a)] has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 5 of this Act [25 USCS § 1704] and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 4 of this Act [25 USCS § 1703] after the purchase described in subsection (a) shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 5, 6, 7, and 8 of this Act [25 USCS §§ 1704-1706 and this section], the United States shall have no further duties or liabilities under the Act [25 USCS §§ 1701 et seq.] with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: Provided, however, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or

equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: Provided, however, That nothing in this Act [25 USCS §§ 1701 et seq.] shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

§ 1708. Applicability of State law; treatment of settlement lands under the Indian Gaming Regulatory Act

(a) In general. Except as otherwise provided in this Act [25 USCS §§ 1701 et seq.], the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(b) Treatment of settlement lands under the Indian Gaming Regulatory Act. For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

§ 1709. Preservation of Federal benefits

Nothing contained in this Act [25 USCS §§ 1701 et seq.] or in any legislation enacted by the State of Rhode Island as described in section 7 of this Act [25 USCS § 1706] shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669-669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777-777(k)).

§ 1710. Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this Act [25 USCS §§ 1701 et seq.].

§ 1711. Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this Act [25 USCS §§ 1701 et seq.] shall be barred unless the complaint is filed within one hundred and eighty days of the date of enactment of this Act [enacted Sept. 30, 1978]. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

§ 1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b)—

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown, from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 6 of this Act [25 USCS § 1705]), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1

Stat. 137) [unclassified], and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of the date of enactment of this Act [enacted Sept. 30, 1978]: Provided, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

§ 1715. Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c), the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this Act [25 USCS §§ 1701 et seq.] shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

§ 1716. Deferral of capital gains

For purposes of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] [26 USCS §§ 1 et seq.], any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of the Internal Revenue Code of 1954 [1986] [26 USCS § 1033].

PETITIONER'S BRIEF

Batch 818

94

No. 07-526

FILED

JUN 6 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF PETITIONER TOWN OF CHARLESTOWN, RHODE ISLAND

JOSEPH S. LARISA, JR.
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700
joe.larisa@verizon.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 permits the Secretary to take land into trust for certain Indian tribes, thereby significantly impairing state jurisdiction. In *United States v. John*, 437 U.S. 634 (1978), this Court concluded that the 1934 Act contained a temporal "recognized [in 1934] tribe" limitation. Likewise, the Fifth Circuit has held that the 1934 Act "positively dictates" that the only Indian tribes for whom land can be taken into trust are those that were "recognized" and "under federal jurisdiction" as of "June 1934." The Ninth Circuit affirmed a district court decision to the same effect.

The Rhode Island Indian Claims Settlement Act provides land specifically for the later recognized Narragansett Indian Tribe and comprehensively disposes of all Indian land claims in Rhode Island. The Tribe received 1,800 acres of land for free. In exchange, Congress extinguished aboriginal title and all Indian interests in land in Rhode Island. The questions presented are:

1. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. Charlestown's Special Interest in This Case	2
B. Historical Background	4
C. Proceedings Below	14
SUMMARY OF ARGUMENT	19
ARGUMENT	21
I. THE INDIAN REORGANIZATION ACT APPLIES ONLY TO THOSE INDIAN TRIBES THAT WERE BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934	21
A. The Plain and Unambiguous Language of the IRA Precludes the Secretary from Taking Land into Trust for the Narragansett Indian Tribe	22
B. This Court (and Two Circuit Courts) Have Already Interpreted the IRA to Contain a "Recognized [in 1934] Tribe" Limitation	25

TABLE OF CONTENTS – Continued

Page

C. The Purpose and Legislative History of the IRA Fully Support the Temporal Limitation 29

D. The Government's Contemporaneous Interpretation of the IRA and its Decades-Long Implementation are Consistent with the Temporal Limitation 31

II. THE SETTLEMENT ACT BARS THE SECRETARY FROM CONVERTING THE PARCEL TO TRUST 35

A. Congress Abolished Indian Territorial Sovereignty in Rhode Island 36

1) The Settlement Act extinguished all aboriginal title in Rhode Island 36

2) Aboriginal title is an Indian estate in land with territorial sovereignty as a defining incident 37

3) Trust title is essentially aboriginal title under a different name 41

4) Where Congress extinguishes aboriginal title, it necessarily prohibits trust 44

B. The Settlement Act's Extinguishment of All Indian Claims Involving Rights and Interests in Land Precludes Indian Territorial Sovereignty 48

TABLE OF CONTENTS – Continued

Page

C. The Plain Language and Purpose of the Settlement Act are Incompatible with Trust Under the IRA 54

CONCLUSION 58

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) 50

Alaska v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996) 50

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 29

Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) ..... *passim*

Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) 1, 16

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Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978) 43

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 21

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In re Narragansett Indians, 40 A. 347 (R.I. 1898) 5, 6

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TABLE OF AUTHORITIES – Continued

Page

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).....54

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004).....31

Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213 (D. Haw. 2002).....28, 29, 31, 35

Montana v. Kennedy, 366 U.S. 308 (1961).....23

Montana v. United States, 450 U.S. 544 (1981) 51

Narragansett Indian Tribe v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996).....51

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).....38

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) 43

South Dakota v. Bourland, 508 U.S. 679 (1993)....39, 51

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).....36, 38

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946).....46

United States v. John, 437 U.S. 634 (1978).....20, 22, 25, 26, 32

United States v. McGowan, 302 U.S. 535 (1938).....50

United States v. State Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) 26, 27

United States v. Wheeler, 435 U.S. 313 (1978) 36, 39

TABLE OF AUTHORITIES – Continued

Page

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) 54

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 39

Worcester v. Georgia, 31 U.S. 515 (1832) 7, 39

STATUTES

25 U.S.C. § 177 ..... 11, 38, 54

25 U.S.C. § 461 ..... *passim*

25 U.S.C. § 465 ..... 22, 42, 43, 45, 46

25 U.S.C. § 472 23

25 U.S.C. § 479 ..... *passim*

25 U.S.C. § 1701 ..... *passim*

25 U.S.C. § 1705(a)(1) 36

25 U.S.C. § 1705(a)(2) 13, 36

25 U.S.C. § 1705(a)(3) 13, 50, 51, 52

25 U.S.C. § 1706(a)(1) 13

25 U.S.C. § 1706(a)(2) 13

25 U.S.C. § 1707(c) 13, 53

25 U.S.C. § 1708(a) 13

25 U.S.C. § 1712(a)(1) 37

25 U.S.C. § 1712(a)(2) 13, 37

25 U.S.C. § 1712(a)(3) 13, 50, 51

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 15

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TREATISES

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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OPINIONS BELOW

The First Circuit sitting en banc issued a divided opinion, the subject of this appeal, reported at 497 F.3d 15 (1st Cir. 2007) (en banc) and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") 1-81. The court upheld the decision of the District Court for the District of Rhode Island reported at 290 F. Supp. 2d 167 (D.R.I. 2003). Pet. App. 84. Prior to the en banc opinion, a panel of the First Circuit issued two separate opinions. The first opinion is reported at 398 F.3d 22 (1st Cir. 2005). That opinion was withdrawn and the judgment vacated by Order of September 13, 2005. Pet. App. 137-38. The Panel reissued a divided opinion on September 13, 2005 that is reported at 423 F.3d 45 (1st Cir. 2005). That opinion and partial dissenting opinion were also withdrawn and the judgment vacated by Order of December 5, 2006. Pet. App. 139-41. That Order also granted en banc review. *Id.*

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007, and was granted with respect to the questions presented above on February 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Indian Reorganization Act of 1934 (the "1934 Act" or the "IRA"), 25 U.S.C. § 461, *et seq.* and the Rhode Island Indian Claims Settlement Act (the "Settlement Act") 25 U.S.C. § 1701, *et seq.* are both reprinted in the statutory appendix to the Governor's brief.

STATEMENT OF THE CASE

A. Charlestown's Special Interest in This Case

This case was brought by Petitioners Donald L. Carcieri, the Governor of Rhode Island, the State of Rhode Island and the Town of Charlestown ("Charlestown" or the "Town"), a seaside, rural community with a population of about 8,000 in southern Rhode Island. The Town is situated differently than and represents an institutional interest distinct from the two state actors. All 1,800 acres of the Narragansett Indian Tribe's (the "Tribe") Settlement Lands are located in Charlestown and are the heart of the Tribe's ancestral home. Additionally, the Tribe's headquarters and health care center are located on fee land in the Town. The 31-acre parcel at issue here is in the Town, just across the street from the Settlement Lands.

Unlike the state actors, the Town interacts with the Tribe frequently, and in areas relevant to this jurisdictional dispute (*e.g.*, easements, access rights,

property taxation) that the state actors do not. Charlestown was the only municipality sued by the Tribe in its land claims lawsuits. It was the only municipality to sign the Joint Memorandum of Understanding to settle those lawsuits and the only municipality participating in the negotiation of the resulting Settlement Act, which ultimately placed the Settlement Lands under state and town jurisdiction.

The Charlestown police force is the first responder to incidents on the Settlement Lands and works with tribal police to address incidents occurring on and off those lands. The Town is often separately consulted concerning proposed action by the Tribe and/or the federal government on the Settlement Lands (*e.g.*, federal highway dollars, economic development proposals) and its jurisdictional concerns may differ from that of the state actors (*e.g.*, zoning, traffic, hours of operation). The Town opposed a tribal smokeshop on the Settlement Lands as well as a proposed tribal casino under the Indian Gaming Regulatory Act. In sum, the location of the Tribe and its land in the Town results in a special relationship foreign to other Rhode Island towns and different in nature than the state actors.

The Town joins the Governor and the State in challenging a decision by the Secretary of the Interior to convert a 31 acre parcel of land in Charlestown (the "Parcel") to trust under Section 465 of the IRA for the Tribe. The Town contends that the Secretary is prohibited from converting land to trust for the Tribe for two reasons. First, the IRA – the statutory source

of the Secretary's power to convert land to trust for Indians – requires recipient tribes to be federally recognized and under federal jurisdiction as of 1934. The Tribe meets neither express eligibility requirement. Second, the Settlement Act, which governs Indian land tenure in Rhode Island, prohibits the establishment and exercise of Indian territorial sovereignty in Rhode Island, including the establishment of sovereign authority arising from trust.

The Respondents are Dirk Kempthorne, in his capacity as Secretary of the Department of the Interior and Franklin Keel, in his capacity as Eastern Area Director of the Bureau of Indian Affairs ("BIA") within the Department of the Interior. They contend – and the courts below held – that neither the IRA nor the Settlement Act contain any limitation on the Secretary's power to convert land to trust for the Tribe anywhere in the Town of Charlestown or the State of Rhode Island.

B. Historical Background

At one time one of the most powerful tribes in New England, the Narragansett were reduced in size and political power during the first 50 years of contact with English settlers by epidemics and conflicts with other tribal groups. Then, in 1675, the Tribe was drawn into King Philip's War, one of the bloodiest wars in American history and was decimated in the "Great Swamp Fight" in December of that year. In succeeding years, the Tribe was further defeated in

several large battles, with the result that much of the Tribe was disbursed. Some members joined other New England tribes or were captured and forced into indentured servitude among the colonists. Others were sold into slavery in the West Indies. A number of the remaining Narragansett survivors combined with a neighboring tribe, the Niantic, and the group, located in Charlestown, became known as the Narragansett Indian Tribe. United States Dep't of Interior, Recommendation and Summary of Evidence for Proposed Finding of Federal Acknowledgment 1-2 (July 29, 1982) *available at* http://www.indianz.com/adc20/Nar%5CV001%5CD007.PDF ("Recommendation").

From 1675 until 1880, the Tribe existed under a form of guardianship first under the Rhode Island colony and later under the State. Recommendation at 3-4. Because of the level of intermarriage to non-Indians and the poor economic condition of the Tribe, the State appointed a commission to determine whether it should abolish tribal relations of the group, make them citizens and end their relationship with the State. By 1850, "it was apparent that the Narragansett tribe had become extinct in all but name." *In re Narragansett Indians*, 40 A. 347, 362 (R.I. 1898). The Report of the Rhode Island Indian Commissioner in 1858 indicated that of the remaining Narragansetts, "there is not an Indian of full blood remaining; only two of three-fourths, and nine of half blood. The one hundred and twenty-one less than half blood are of mixed grades of Indian, negro and white." *Id.* In order to distribute the money

raised from the sale of tribal land to members of the Tribe, the State, in cooperation with the Tribal Council, prepared a list of approximately 324 tribal members (the "1880 Roll"). Recommendation at 16-17. The current requirement for membership in the Narragansett Indian Tribe is proof of lineal descent from the 1880 Roll, rather than any blood quantum requirement. Recommendation at 15.[1]

In 1879, the Narragansett Tribal Council voted to sell virtually all of its remaining 927 acres of tribal land and, in 1880, the Rhode Island General Assembly passed legislation abolishing tribal authority and tribal relations, declaring tribal members citizens, ending the State's relationship with the Tribe and authorizing the sale of tribal lands. The proceeds of the land sale were to be distributed to individual members. Recommendation at 4. That legislation was passed "by consent and agreement with the recognized representatives of [the Tribe]." *In re Narragansett Indians*, 40 A. at 363.

In 1934, Congress passed the IRA, which was designed to reverse a prior federal policy of allotting federal reservations to individual Indians in severalty, thereby abolishing pre-existing federal Indian reservations. The purpose of the IRA, discussed *infra*,

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[1] As such, over 70 years later – at the time of passage of the IRA – and at the time of the trust application in 1999, there were no remaining Narragansett Indians who met the half-blood quantum requirement contained in Section 479 of the IRA as discussed below.

was to return a land base to those tribes that lost or could have lost land through allotment; namely, those tribes that were previously federally recognized and under federal jurisdiction at the time of the Act.

At the time the IRA was passed in 1934, the Narragansett Indian Tribe – like a number of other Indian tribes in New England – was neither recognized nor under the jurisdiction of the federal government. As this Court noted,

> In some of the old states, Massachusetts, Connecticut, Rhode Island and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self government, the laws of the state have been extended over them, for the protection of their persons and property.

Worcester v. Georgia, 31 U.S. 515, 580 (1832).

The legal fact that the Narragansett at the time of IRA passage were neither federally recognized nor under federal jurisdiction was affirmed in crystal clear language by the Secretary both before and after passage of the IRA. In 1927, some seven years before passage of the 1934 Act, the Indian Affairs Office addressed the question of whether the Tribe was under federal jurisdiction. Tribal leader John Noka sent a letter dated April 25, 1927 to the federal Commissioner of Indian Affairs, in which he "request[ed] the Federal Government to take charge of the affairs

of the Narragansett Indians." On May 5, 1927, the Assistant Commissioner responded that:

> The Narragansett Indians are and have been under the jurisdiction of different states of New England. The Federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs. . . . [A]ll communications in regard to your affairs should be taken up with the proper state officials.

J.A. 20.

The Assistant Commissioner, in a letter dated June 29, 1927, took the same position in another letter to Tribal leader Daniel Sekater. J.A. 21. Again on July 19, 1927, the federal government returned to Mr. John Noka a list he provided of Narragansett Indians, again repeating that "[t]he Narragansett Indians are not under the jurisdiction of the Federal Government, and the list is being returned to you for submission to the proper state authorities." This letter is attached in an Addendum at Tab 5 to Appellants' Joint Memorandum of Law filed in the First Circuit on February 6, 2004. Three years later, on January 11, 1930, the Commissioner of Indian Affairs reiterated:

> Under date of June 29, 1927, you were advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never

> provided any authority for the various Departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of the different states of New England.
>
> You were further advised that there is no possible way in which this Office could furnish the Narragansett Tribe with any assistance and that all matters in regard to their affairs should be taken up with proper state officials.

Appellants' Joint Memorandum of Law, Addendum at Tab 5.

The historical conclusion and position of the BIA remained the same in correspondence three years after passage of the 1934 Act. In a letter from the Indian Affairs Office to Rhode Island Congressman O'Connell dated March 18, 1937, the Commissioner, who at that time was John Collier, replied:

> We have had correspondence directly with Mr. Daniel Sekater relative to this matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe any assistance.

> *The situation has not changed since the above mentioned letter was written.*

J.A. 22 (emphasis added).

Commissioner Collier not only authorized this letter on behalf of the Indian Affairs Office, but did so just three years after he penned the pre-enactment change to the IRA changing inclusion in the IRA from all "recognized Indian tribe[s]" to those "now under Federal jurisdiction." *See Hearings before the Senate Committee on Indian Affairs,* 73d Cong. 2d Sess., part 2, at 264-66 (1934). The Commissioner of Indian Affairs and the author of the provision of the IRA at issue in this case viewed the enacted IRA as *not* applying to the Narragansett Indian Tribe – absent express authority provided by Congress in separate legislation.[2]

Separate legislation for the Tribe was passed by Congress in 1978 in the form of the Settlement Act. That Act, however, and its subsequent amendment in 1996, not only refused to include the Tribe in the IRA or provide independent trust-taking authority – as explained below, it affirmatively extinguished the Tribe's claim to aboriginal title and any Indian rights or interests in land in Rhode Island.

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[2] As shown below, Felix S. Cohen, then Assistant Commissioner of Indian Affairs and later the author of the seminal treatise on Indian law, came to the same legal conclusion as Commissioner Collier with respect to the inapplicability of the IRA to Indian tribes not recognized and under federal jurisdiction at the time the IRA was passed.

In 1975, the Tribe sued the State, the Town and some Charlestown land owners to recover 3,200 acres based upon ancient aboriginal title to the Tribe's former colonial domain (the "Lawsuits"). The Tribe alleged that the 1880 sale of its aboriginal land was without congressional approval as required by the Indian Trade and Intercourse Act of 1790, 25 U.S.C. § 177 (commonly referred to as the Nonintercourse Act) and that, accordingly, the sale was null and void. Complaint in *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, at ¶¶ 11-12. A copy of the Complaint is attached to the Plaintiffs' Joint Motion for Summary Judgment filed in the United States District Court for the District of Rhode Island on February 15, 2002 at *Exh. A*. The 31-acre housing site that is the subject of this litigation (the "Parcel")[3] was part of the 3,200 acres over which the Tribe asserted aboriginal title in the Lawsuits. *Carcieri v.*

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[3] Trust is not necessary to fulfill Narragansett housing plans for the Parcel, which is owned by a nonprofit corporation (and thus is not subject to property taxes). Moreover, the housing can be and has already been permitted in accordance with state law and town ordinance. There also is no law or regulation requiring the subject Indian housing to be on land held in trust.

Likewise, the inapplicability of the 1934 Act has no impact on the Tribe's right to any of the other federal programs for which the Tribe is eligible because of its federal recognition in 1983. The Tribe receives substantial funding each year under federal programs, including those for tribal health care, social services, housing, natural resources, historic preservation, policing, vocational training, and child care. *See* www.narragansett-tribe.org/programs.htm (discussing programs).

Norton, 290 F. Supp. 2d 167, 170-71 (D.R.I. 2003). Pet. App. 86.

In 1978, the parties settled the Lawsuits and entered into a Joint Memorandum of Understanding ("JMOU") signed by the State, the Tribe, the Town and individual landowners. The JMOU is reprinted in the Joint Appendix ("J.A.") at 24-37. The essential structure of the deal called for the establishment of a state chartered corporation (the "State Corporation") for the purpose of "acquiring, managing and permanently holding" 1,800 acres within the Tribe's historic domain, 900 acres of which was to be donated by the State, with the remainder to be purchased with federal funds appropriated for the purpose (collectively referred to as the Settlement Lands). JMOU at ¶¶ 1, 5. J.A. 24-25. The Parcel, although claimed in the Lawsuits, did not become part of the Settlement Lands; it was separately purchased by the Tribe's housing authority in fee simple many years later, and is separated from the Settlement Lands by a town road. *Carcieri v. Kempthorne*, 497 F.3d 15, 23 (1st Cir. 2007). Pet. App. 12.

The Settlement Lands were to be held in trust by the State Corporation for the benefit of the descendants of the 1880 Roll, JMOU at ¶ 8, and, with minor exceptions not relevant here, were to be subject to the "full force and effect" of State laws. JMOU at ¶ 13. J.A. 26-27. For its part, the Tribe agreed that federal legislation would be obtained that "eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island," JMOU at ¶ 6, and agreed to dismiss the Lawsuits

with prejudice upon the effective date of that legislation. JMOU at ¶ 19. J.A. 25, 28.

Ultimately, Congress blessed the parties' agreement by passing the Settlement Act. Under the terms of the Settlement Act, the State was required to enact legislation creating a state-chartered corporation "to acquire, perpetually manage and hold the settlement lands," governed by a board of directors selected by the Tribe and the State. 25 U.S.C. §§ 1706(a)(1), (2). Elsewhere in the Settlement Act, Congress required that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). Congress also extinguished the Tribe's aboriginal title to land throughout Rhode Island, 25 U.S.C. §§ 1705(a)(2); 1712(a)(2), and separately extinguished the Tribe's (or any successor in interest to the Tribe) ability to make any "claims" "based upon any interest in or right involving" land in Rhode Island. 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). Finally, Congress discharged the United States from any "further duties or liabilities under the [Settlement Act] with respect to the [Tribe], the State Corporation, or the Settlement Lands." 25 U.S.C. § 1707(c).

The Tribe received federal recognition in 1983. Final Determination for Acknowledgement of Narragansett Indian Tribe of Rhode Island. 48 Fed. Reg. 6177 (1983). *Carcieri*, 497 F.3d at 23. Pet. App. 11. In 1985, the Rhode Island General Assembly terminated the State Corporation, transferring the Settlement Lands to the Tribe and passing the duties and liabilities of the

State Corporation with them. R.I. Gen. Laws §§ 37-18-12, 13 and 14. Several years later, the Tribe deeded the Settlement Lands to the United States to be held in trust. *Carcieri v. Kempthorne,* 497 F.3d at 23. Pet. App. 12. The United States accepted the Settlement Lands in restricted trust only, expressly recognizing the continued "applicability of state laws conferred by the Rhode Island Indian Claims Settlement Act." Deed Conveying the Settlement Lands from the Narragansett Indian Tribe to the United States in Trust. J.A. 41.

C. Proceedings Below

1. On March 6, 1998, the BIA notified the Governor and the Town that the Secretary intended to take the Parcel into federal trust for the Tribe without restriction pursuant to Section 465 of the IRA. *Carcieri,* 497 F.3d at 24. Pet. App. 14. Because the proposed trust acquisition would have resulted in an ouster of the State's civil and criminal laws and jurisdiction from the Parcel in favor of a federal and tribal jurisdictional regime – a jurisdictional first given that there has never been any sovereign territory for any Indian tribe in Rhode Island since statehood – the Governor and the Town immediately appealed. The Interior Board of Indian Appeals ("IBIA") affirmed the Secretary's decision to convert the Parcel to trust. J.A. 46-68.

2. The IBIA decision was, in turn, appealed to the United States District Court for the District of Rhode Island. There, the Petitioners argued, *inter*

alia, that the Secretary was prohibited from converting land to trust for the Tribe under the IRA. First, by its own terms, the IRA is temporally limited to those tribes both federally recognized and under federal jurisdiction in 1934; since the Tribe was neither recognized nor under federal jurisdiction then, the Secretary could not convert land to trust for their benefit under the IRA. Second, the Settlement Act independently precludes trust conversions by the Secretary for Indians in Rhode Island by extinguishing aboriginal title and all Indian claims "based upon any interest in or right involving" land in Rhode Island. The District Court rejected both arguments and entered final judgment in favor of the Secretary. *Carcieri*, 290 F. Supp. 2d 167. Pet. App. 84-136.

3. The Governor, State and Town appealed the District Court's final decision to the United States Court of Appeals for the First Circuit pursuant to 28 § U.S.C. 1291. There, a three-judge panel held that the Secretary could take land into trust for the Tribe in Rhode Island, but declined to reach the issue of whether lands so converted remain subject to the State's civil and criminal laws and jurisdiction. *Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005). The State petitioned for a rehearing asserting that the panel had failed to reach the central issue of the case: jurisdiction. Supplemental briefing was ordered by the full court and, on September 13, 2005, the court ordered the three-judge panel to rehear the case. The panel opinion was withdrawn and the judgment vacated. Order of September 13, 2005. Pet. App. 137-38.

The three-judge panel issued another decision which rejected the State's arguments, permitted the Secretary to take the Parcel into unrestricted trust and determined that the Parcel would be subject to federal and tribal law, rather than state law. This time, Judge Howard dissented, arguing that the extinguishment provisions of the Settlement Act encompassed all Indian sovereignty claims, including those arising from trust. *Carcieri v. Norton*, 423 F.3d 45, 71-72 (1st Cir. 2005) (Howard, J., dissenting) (rehearing opinion). The Governor, State and Town petitioned for en banc rehearing. The full court granted the petition, the rehearing opinion was withdrawn, and the judgment based thereon once again vacated. The parties (as well as the scores of amici that were, by then, involved in the case) were permitted to file another round of supplemental briefs and the case was reheard, en banc, on January 7, 2007. Order of December 5, 2006. Pet. App. 139-41.

The full court then issued a 4-2 decision, affirming the Secretary's ability to take land into trust for the Tribe. The court, noting that "[t]he State's challenges to the Secretary's authority under the IRA and the Constitution have national implications that reach beyond Rhode Island," rejected each of the State's defenses to the Secretary's trust acquisition. *Carcieri v. Kempthorne*, 497 F.3d 15, 21 n.2 (1st Cir. 2007) (en banc). Pet. App. 7-10. It determined that the "recognized in [1934] tribe" limitation contained in Section 465 of the IRA is "ambiguous" and, having injected ambiguity, accorded the Secretary complete

deference in construing the 1934 Act as applying to any and all federally recognized tribes, regardless of the date of recognition. *Id.* at 26-35. Pet. App. 19-37.

On the State's argument that the later-enacted Settlement Act's extinguishment of aboriginal title and Indian claims based upon rights or interests in land separately prohibited Indian territorial sovereignty, the court was sharply divided. Both the majority and the dissenters agreed on the obvious – that the Secretary's acquisition will divest the State of fundamental aspects of its sovereignty over land so acquired, while at the same time granting the Tribe broad territorial sovereignty there. With scant analysis, however, the four-judge majority concluded that the Settlement Act did not prohibit the ouster of state sovereignty and the concomitant imposition of Indian sovereignty that are the hallmarks of trust. In the majority's view, Indian claims of sovereignty over land simply are not the type of claims extinguished by Congress in the Settlement Act. *Id.* at 34-39. Pet. App. 37-50.

Specifically, the majority held that "[t]rust acquisition is not incompatible with the extinguishment of aboriginal title" because the extinguishment of aboriginal title merely eliminated one "form of title." *Id.* at 36. Pet. App. 42-43. In the majority's view, the Settlement Act's elimination of this one form of Indian title did not preclude the reestablishment of tribal sovereignty over land by "alternative means," such as the conversion of land to trust under the IRA. *Id.* at 36. Pet. App. 42. In other words, other forms of

title could still be established in Rhode Island that would yield the same sovereignty allocation between the Tribe and the State as aboriginal title, so long those forms are not called "aboriginal title."

The majority went on to hold that the "all Indian claims" extinguishment further eliminates "claims based on *other forms of title,* besides aboriginal title. . . ." *Id.* Pet. App. 43 (emphasis added). Yet, despite this conclusion, it failed to read the "all Indian claims" extinguishment as eliminating claims based on one particular "other form of title" – trust title. Instead, it narrowly confined the scope of the "all Indian claims" extinguishment to "traditional property claims" that did not extend to Indian claims of sovereign authority over land. *Id.* Pet. App. 43.

Finally, the majority held that Petitioners' argument concerning the Settlement Act's restrictions on the Tribe's ability to regain territorial sovereignty "misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." *Id.* Pet. App. 44. The majority concluded that whatever restrictions on the establishment of sovereignty Congress placed on the Tribe's ability to establish territorial sovereignty in Rhode Island, such restrictions do not bind the Secretary when he reestablishes sovereign control over territory for the Tribe.

The dissenters, by contrast, rejected the majority's "wooden" reading of the Settlement Act, *id.* at 51, Pet. App. 79 (Selya, dissenting), and viewed the

extinguishment provisions broadly. Citing to the congressional record, they argued that Congress intended to extinguish claims raised by "Indians qua Indians" and that the ouster of state jurisdiction over land and the establishment of Indian territorial sovereignty there are *quintessential* Indian land claims. *Id.* at 49. Pet. App. 74-75 ("It is beyond peradventure that asking to have land taken into trust by the BIA under the IRA to effect an ouster of state jurisdiction is a quintessential 'Indian' land claim.") (Howard, dissenting). Judge Howard's dissent also noted the "exquisite irony" of the majority's opinion. While acknowledging that in the heart of its historic domain, the Tribe is fully subject to state laws and jurisdiction, the opinion nevertheless authorizes the Secretary to establish sovereign territory for the Tribe everywhere else. *Id.* at 49-50. Pet. App. 75-76.

Shortly after the en banc decision was issued, the State filed a Motion for a Stay of Mandate. Recognizing the impact of the case, both in Rhode Island and nationwide, the First Circuit stayed its mandate "pending resolution of the petition by the United States Supreme Court." Pet. App. 82-83.

SUMMARY OF ARGUMENT

Two acts of Congress preclude the Secretary from taking land into trust in Rhode Island for the Narragansett Indian Tribe. First, the IRA – enacted in 1934 – authorizes land to be taken into trust only for "any

recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). As every court to have construed the provision has concluded – until the First Circuit's opinion below – "now" means "now," not "later" or "now or hereafter." This Court's opinion in *United States v. John*, 437 U.S. 634 (1978) acknowledging the IRA's "recognized [in 1934] tribe" limitation, other provisions of the IRA, its legislative history and purpose, as well as the federal government's own contemporaneous position all make that clear. The IRA does not authorize the Secretary to take land into trust for an Indian tribe, like the Narragansett, that was neither federally recognized nor under federal jurisdiction until decades after the IRA's passage.

Second, the Settlement Act expressly extinguished all aboriginal title in Rhode Island and further extinguished all Indian claims based on interests in or rights involving land in Rhode Island. Allowing the Secretary to convert the Parcel to trust under the IRA violates the Settlement Act's extinguishment because trust reestablishes the fundamental and defining attributes of the aboriginal title estate. A trust conversion also violates the Settlement Act's broader extinguishment of all Indian claims involving land because trust gives rise to the quintessential Indian land claim – the exercise of territorial sovereignty to the exclusion of state laws.

Not only does converting land to trust violate the express extinguishment provisions of the Settlement Act, it also violates the intent of the parties in settling

the Lawsuits and the intent of Congress in ratifying that settlement. All sought to eliminate every Indian claim to land in Rhode Island, including those claims that can be made uniquely by Indian tribes, like claims to sovereign authority over land.

ARGUMENT

I. THE INDIAN REORGANIZATION ACT APPLIES ONLY TO THOSE INDIAN TRIBES THAT WERE BOTH FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934

The First Circuit held that the IRA applies to a Tribe neither federally recognized nor under federal jurisdiction in 1934. It did so on the ground that the applicable statutory test is "ambiguous" and therefore that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was "permissible" for the Secretary to interpret "now" when used by Congress in 1934 to mean not only at the time of passage of the IRA, but also at any point in the future.[4] *Carcieri*, 497 F.3d at 30. Pet. App. 29.

In declining to temporally limit the IRA to tribes that were both federally recognized and under federal

[4] As this Court also held in *Chevron*, where Congress has plainly expressed its intent "the court, as well as the agency, must give effect to th[at] unambiguously expressed intent." 467 U.S. at 842-43. It is that part of *Chevron* that controls here.

jurisdiction in 1934, the First Circuit committed clear legal error. Its conclusion is in direct conflict and/or inconsistent with: 1) the plain and unambiguous language of the IRA; 2) this Court's conclusion in *United States v. John*, 437 U.S. 634 (1978), which interpreted Section 479 of the IRA as setting forth a "recognized [in 1934] tribe" test for tribal inclusion; 3) the IRA's purpose and legislative history; and 4) the federal government's contemporaneous interpretation of the IRA, which it followed for decades after passage, taking not a single acre into federal trust for a newly recognized tribe.

A. The Plain and Unambiguous Language of the IRA Precludes the Secretary from Taking Land into Trust for the Narragansett Indian Tribe

The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. For the purpose of Section 465:

> [t]he term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all of the persons of

> one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. § 479 (emphasis added).

It is surpassingly clear that when Congress uses the word "now" as an eligibility criterion for inclusion in a statute in the way Congress does in the IRA, it means on the date the statute is enacted. While the Secretary argued in opposition to certiorari that "now" should mean "at a later time," *see Cert. Opp.* at 7, this Court has never so held. On the contrary, in *Montana v. Kennedy*, this Court held that the plain meaning of the word "now" is to temporally limit application to persons who meet the statutory test "on . . . the effective date of the . . . statute," and "had no prospective application." 366 U.S. 308, 310-11 (1961).

When Congress wished to include events subsequent to passage of the IRA it did so expressly. Section 472 of the IRA, for example, applies to employment positions maintained "now *or hereafter*." (emphasis added). The absence of the words "or hereafter" in Section 479 precludes an interpretation that effectively reads those words into that section. At the time of the passage of the 1934 Act and to the present day, Congress had at least three ways to include the Tribe within its purview. It could have omitted or deleted "now" from Section 479, it could have added "or hereafter" to the definition, or it could

have (as it did with other tribes) later passed a law specifically authorizing trust for the Narragansett.

Indeed, on numerous occasions since 1934, Congress has passed specific acts including additional tribes within the scope of the IRA or granting them trust land.[5] While Congress has amended the 1934 Act numerous times to include specific additional tribes from certain states that were not then recognized or under federal jurisdiction, it has declined to amend the definitional section of the 1934 Act to remove the general temporal limitation on its application – a limitation referred to by the bill's cosponsor as its "status quo" provision. The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is inconsistent with the position of the Secretary that all tribes, regardless of the date of recognition, are automatically included in the IRA as soon as they become federally recognized. While Congress subsequently passed numerous laws providing financial aid and other benefits to tribes, including the Narragansett, recognized after 1934, the IRA does not apply to later recognized tribes.

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[5] *See, e.g., Hoopa-Yurok Settlement Act*, Pub. L. No. 100-580 (1988) ("The Indian Reorganization Act of June 18, 1934, as amended, is hereby made applicable to the Yurok Tribe . . . "); *Coquille Restoration Act*, Pub. L. No. 101-42 (1989) ("Indian Reorganization Act Applicability. The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members."). Although Congress passed two specific laws for the Narragansetts (the Settlement Act in 1978 and an amendment to the Act in 1996), it has never added them to the scope of the IRA.

Finally, Section 478 of the IRA required the Secretary to call for an election by existing reservation Indians on whether to opt out of the IRA "within one year of June 18, 1934," not within a year of some future recognition of a tribe or reservation. The plain language is entirely inconsistent with the notion that the IRA applied to tribes not then recognized and under federal jurisdiction. *See City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) ("That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

The briefs of the Governor and the State discuss in even more detail additional language and history of the IRA that limits its application as a matter of law and logic only to those Indian tribes both recognized and under federal jurisdiction in 1934. Rather than repeat those powerful points here, the Town joins and incorporates them by reference.

B. This Court (and Two Circuit Courts) Have Already Interpreted the IRA to Contain a "Recognized [in 1934] Tribe" Limitation

In *United States v. John*, this Court set forth the applicable statutory test necessary for a tribe (in that case the Mississippi Choctaw), to be included in the IRA as follows:

1) "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction," or

2) "all other persons of one-half or more Indian blood."[6]

437 U.S. at 649 (bracket by Court).

When it decided *John*, this Court was keenly aware of an earlier Fifth Circuit opinion, *United States v. State Tax Comm'n*, also involving the Choctaw, which squarely held that: "The language of [25 U.S.C. §479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words '*any recognized Indian tribe now under Federal jurisdiction*' and the additional language to like effect." 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original).

The First Circuit dismissed *John* in a single paragraph: referring to *John's* discussion of the question presented here as "musings" which "fall

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[6] Immediately after citing Section 479, this Court further confirmed the temporal limitation of the Act, stating that "[t]here is no doubt that persons of this description [half bloods] lived in Mississippi, and were recognized as such by Congress and by the Department of the Interior *at the time the Act was passed*." 437 U.S. at 650 (emphasis added). This separate "Indian blood" test for IRA inclusion is not at issue in this case. The Secretary has proposed to take the Parcel into trust "for the use and benefit of the Narragansett Indian Tribe of Indians of Rhode Island," and not individual Indians. App. 162. Unlike the Choctaw, the Narragansett have never claimed that tribal members today or at the time the 1934 Act was passed met the half-blood test.

short of even being dicta." 497 F.3d at 28. Pet. App. 22-23. *John*, however, cannot be so cavalierly discarded. The First Circuit correctly notes that *John* was decided on a "different clause" for IRA eligibility; namely, that the Choctaw Tribe included members "of one-half or more Indian blood," and not on the ground that the tribe qualified under Section 479's inclusion regardless of the date it was recognized by the federal government. 497 F.3d at 27-28. Pet. App. 22. That, however, hardly makes this Court's conclusion on Section 479's temporal limitation dicta or worse. That is because nowhere in *John* did this Court express any disagreement with, never mind overrule, the earlier conclusion of the Fifth Circuit in *Tax Comm'n*, that the language of Section 479 "positively dictates that tribal status is to be determined as of June, 1934." 505 F.2d at 642. To the contrary, this Court itself affirmed Section 479's temporal limitation by expressly noting the "recognized [in 1934] tribe" requirement.[7]

By not reversing the Fifth Circuit's earlier conclusion that the 1934 Act was temporally limited to certain tribes, and resting its reversal on an unrelated alternative ground, this Court's interpretation

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[7] As such, if no member of the Choctaw Tribe possessed one-half or more Indian blood at the time of passage of the Act, this Court would have properly concluded that: 1) a "recognized in [1934] tribe test" was contained in Section 479; and 2) the Choctaw Tribe did not pass that test. That same conclusion applies to the Narragansett here.

of Section 479 – while arguably falling short of an outright holding – is in no way mere "musings" or an interpretation that "falls short of even being dicta." 497 F.3d at 28. App. 23. This Court's conclusion that a "recognized [in 1934] tribe" test exists in the 1934 Act – like that of the Fifth Circuit[8] – has sustained precedential value and should be reaffirmed by this Court.

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[8] The Ninth Circuit has also weighed in on the question of whether the 1934 Act contains a temporal limitation. After a detailed discussion of the text and history of Section 479, the District Court interpreted the "recognized [in 1934] tribe" test as a clear temporal limitation:

> [T]he definition of "Indian within the IRA states that it "include[s] all persons of Indian descent *who are members of any federally recognized Indian tribe* ***now*** *under* ***Federal jurisdiction*** *and all persons who are descendants of such members who were, on June 1, 1934 . . . and shall further include all other persons of one-half or more Indian blood.* 25 U.S.C. § 479 [emphasis by court]. This definition was intended to preserve the status quo with respect to who should be considered an Indian.

Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1221 n.10 (D. Haw. 2002) (emphasis in original), *aff'd by* 386 F.3d 1271, 1281 (9th Cir. 2004) ("by its terms, the Indian Reorganization Act did not include any Native Hawaiian group. There were no *recognized* Hawaiian Indian tribes *under federal jurisdiction in 1934*, nor were there any reservations in Hawaii."). This Court denied certiorari. 545 U.S. 1114 (2005); *see also* Elmer Rusco, A Fateful Time: The Background and Legislative History of the IRA, 267 (UNLV Press 2000) (definitional section of IRA applies to all persons of Indian descent who are members of any recognized tribe under federal jurisdiction as of June 1934).

C. The Purpose and Legislative History of the IRA Fully Support the Temporal Limitation

Allowing IRA trust for the Narragansett is inconsistent with the purpose and legislative history of the IRA. This Court has "recognized that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land." *Kahawaiolaa*, 222 F. Supp. 2d at 1221 n.10 citing *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 n.1 (1989). There was never a federal Indian reservation in Rhode Island and Indian land here was never subject to federal allotment. Thus, the goal of IRA – to reverse federal allotment policy and put back together former federal reservations – is not applicable in Rhode Island.[9]

The history of the temporal limitation shows that the chairman of the congressional committee considering the IRA wished to preserve the status quo by including only Indian tribes then presently under federal jurisdiction. There were certain "so-called" tribes in northern California who were apparently under the "supervision" of the federal government. *Hearing Before the Senate Committee on Indian Affairs* 73d Cong., 2d Sess., part 2 at 266 (1934). The chairman

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[9] That the Tribe may have lost land in other ways does not mean the remedial provisions of the IRA must or should apply. Indian claims to regain historic land in Rhode Island were addressed by Congress with the consent and participation of the Tribe, the State and the Town in the 1978 Settlement Act.

did not believe they should be covered by the IRA. At that point, the legislation placed no temporal limitation after the words "recognized Indian tribe." Commissioner of Indian Affairs John Collier suggested that the way to ensure that these tribes were out of the IRA was to limit the inclusion of "recognized Indian tribe[s]" to those "now under Federal jurisdiction." *Id.*

Commissioner Collier was the author of the "now under federal jurisdiction" amendment to the IRA. He proposed this language precisely to prevent new tribes from coming within the IRA's scope. Responding to concerns from senators that tribes that were not bona fide could come within the IRA under the draft definition of "Indian" ("include[s] all persons of Indian descent who are members of any recognized Indian tribe," and all others of one-fourth or more Indian blood) (*Senate 1934 Hearings* at 264), the Commissioner offered the following temporal limitation:

> Would this not meet your thought, Senator: After the word "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Hearing Before the Senate Committee on Indian Affairs 73d Cong., 2d Sess., part 2 at 266 (1934).

Commissioner Collier's proposed amendment was incorporated into the IRA and the cosponsor of the IRA, Senator Edgar Howard, explained to Congress that the amended definitional section "recognizes the status quo of the present reservation Indians and further includes all persons of one quarter Indian blood." *Kahawaiolaa*, 222 F. Supp. 2d at 1221 n.10 (quoting Congressional Debate on the Wheeler-Howard Bill 1973 (1934) in 3 *The American Indian and the United States* (Wilcomb E. Washburn ed. 1973)), *aff'd* 386 F.3d 1271 (9th Cir. 2004). There is thus no doubt that the Commissioner's addition of the temporal limitation was intended to and did exclude the "tribes" at issue from the IRA.

D. The Government's Contemporaneous Interpretation of the IRA and its Decades-Long Implementation Are Consistent With the Temporal Limitation

Three years after his amendment was incorporated into the IRA, Commissioner Collier had the occasion for his office to apply the temporal limitation to the Narragansett Indian Tribe. Seeking federal help, between 1927 and 1937 the Narragansett asked the Office of Indian Affairs for monetary and other assistance. J.A. 20-23. In a pre-IRA letter, the office "advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage

their affairs." J.A. 20. Then, after passage of the IRA, the Tribe asked again for assistance. Referring to his office's prior letters, the Commissioner concluded in 1937 that: "The situation has not changed since the above mentioned letter was written." J.A. 22.

Collier's then-Assistant, Felix S. Cohen, reached the same legal conclusion that the IRA did not apply to tribes that were not recognized and under federal jurisdiction at the time of the Act. Within a year after the IRA passed, Cohen wrote a memo to Collier addressing whether a tribe not under federal jurisdiction at the time of its passage was covered under the 1934 Act. Cohen's answer was no, stating that: "Clearly, this group [Siouan Indians of North Carolina] is not a 'recognized Indian tribe now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one-half or more Indian blood."[10] Department of the Interior

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[10] Cohen went on to explain how Indians of one-half or more blood could come under the IRA. Indeed, the banding together of Indians of half-blood or more is how the Mississippi Choctaw were deemed by this Court to be IRA eligible. *John*, 437 U.S. at 650, n.19 (noting "that approximately 85 percent of this group are full bloods"). Here, the application for trust was made solely on behalf of the Narragansett Indian Tribe and more importantly, unlike the Choctaw, no tribal member claims half-blood status now or as of 1934.

Memorandum from Cohen to Collier dated April 8, 1935 (Obtained from Collections of the Manuscript Division, Justice Blackmun Papers on *U.S. v. John*, Library of Congress).

In short, John Collier, the author of the amendment creating the temporal limitation in Section 479, who was also the Commissioner of Indian Affairs during the IRA's passage, as well as Assistant Commissioner Felix S. Cohen, both agreed with the plain reading of Section 479 put forth by the Petitioners in this case.

It is thus not surprising that the federal government itself took no action contrary to the legal conclusion of Collier and Cohen for at least the first 40 years after passage of the IRA. In 1975, the Bureau of Indian Affairs commissioned a report entitled "Report on the Purchase of Indian Land and Acres of Indian Land in Trust 1934-1975" Appendix A3, *microformed at* Suffolk Univ. Sch. of Law, Microforms Drawer 162, Title 3322 (the "BIA Indian Trust Lands Report" or "Report"). The Report details the trust acquisitions made by the BIA under Section 465 of the IRA for specific tribes during three periods: 1934-46; 1946-56; and 1956-75. A copy of Appendix A3 of the Report is attached as Exhibit A to State Appellants' Response to Amici filed in the First Circuit on August 31, 2005. All of the trust acquisitions detailed therein are for tribes that were federally recognized and under federal jurisdiction in 1934. Indeed, virtually every tribe listed in the Report for whom the BIA took land into trust during this period also appears on the

Department's own list of IRA-eligible tribes published by the Department in 1946. *See* Theodore H. Hass, Ten Years of Tribal Government Under I.R.A., at http://thorpe.ou.edu/IRA/ IRAbook.[11]

Thus, the BIA's own documents indicate that from 1934 until 1975, Secretaries of the Interior converted land to trust under the IRA exclusively for those tribes that were federally recognized and under federal jurisdiction in 1934.[12] In 1980, the Secretary had no dispute with the plain reading of Section 479 as including a temporal limitation "granting this point arguendo . . . and nowhere attempting to refute it." *City of Sault Ste. Marie*, 532 F. Supp. at 161 n.6.

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[11] In order to determine which tribes were eligible to opt out of the 1934 Act, the Secretary had to determine which tribes were *in* the Act. Therefore, "a list of 258 tribes was made of all those eligible to participate in voting to reorganize under the IRA or not. As a practical matter, this list can be said to be the constructive 'list' of Indian tribes recognized by the United States in 1934." William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 356 (1990); *see also* Theodore H. Hass, *Ten Years of Tribal Government Under I.R.A.*, Table A at http://thorpe.ou.edu/IRA/IRAbook, (Interior-commissioned report detailing which tribes voted to accept or reject the IRA with election dates). The contemporaneous creation of such a list by the Secretary of IRA eligible tribes is inconsistent with his position here that every recognized tribe is eligible.

[12] Since the 1970s, with at most one or two exceptions, the Department has converted land into trust for non-1934 Act tribes only pursuant to a separate settlement or other act of Congress specifically authorizing the trust conversion.

Moreover, in 2002 the Secretary did not argue against the District Court of Hawaii's conclusion in *Kahawaiolaa*, 222 F. Supp. 2d 1213, concluding that the IRA was temporally limited. The historic interpretation of the government upon passage of the IRA and years of action consistent with that interpretation belies the Secretary's newly-hatched position in this case.

II. THE SETTLEMENT ACT BARS THE SECRETARY FROM CONVERTING THE PARCEL TO TRUST

Allowing the Secretary to convert the Parcel to trust under the IRA violates the Settlement Act's extinguishment of aboriginal title because such a conversion reestablishes all of the fundamental and defining incidents of the aboriginal title estate. The trust conversion also violates the Settlement Act's broader extinguishment of all claims based upon Indian interests in or rights involving land in Rhode Island because trust gives rise to the quintessential Indian claim involving land – a claim of right to exercise tribal territorial sovereignty to the exclusion of state laws.

Not only does converting land to trust violate the express extinguishment provisions of the Settlement Act, it also violates the intent of the parties in settling the Lawsuits and the intent of Congress in ratifying that settlement. All sought to eliminate every Indian claim to land in Rhode Island including, of course, those claims that could be made uniquely

by Indian tribes, like claims to sovereign authority over land.

A. Congress Abolished Indian Territorial Sovereignty in Rhode Island

1) The Settlement Act extinguished all aboriginal title in Rhode Island

Congress has the absolute right to extinguish aboriginal title. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955) (power of Congress to extinguish aboriginal title is supreme); *see also United States v. Wheeler*, 435 U.S. at 313, 323 (1978) (tribal sovereignty – whether land based or membership based – "exists only at the sufferance of Congress and is subject to complete defeasance.").

There is no question that Congress has effected a wall-to-wall extinguishment of aboriginal title in Rhode Island. In section 1705 of the Settlement Act, Congress retroactively approved all prior land transfers from the Narragansett Indian Tribe anywhere within the United States and extinguished Narragansett aboriginal title to that land. 25 U.S.C. § 1705(a)(1), (2). Congress also retroactively approved all prior land transfers from any other Indian tribes within Charlestown and extinguished other Indian tribes' aboriginal title to land in Charlestown. *Id.* In section 1712 of the Settlement Act, Congress retroactively approved all prior land transfers from other Indian tribes within Rhode Island but outside Charlestown and extinguished all other Indian tribes'

aboriginal title to that land. 25 U.S.C. §§ 1712(a)(1), (2). In this way, Narragansett aboriginal title was extinguished nationwide and all other tribes' aboriginal title was extinguished within the borders of Rhode Island.

2) Aboriginal title is an Indian estate in land with territorial sovereignty as a defining incident

While the First Circuit rightly determined that the Settlement Act extinguished aboriginal title throughout Rhode Island, it failed to recognize the essential nature of the aboriginal title estate. As a result, it greatly diminished the scope of Indian interests divested by an extinguishment of that estate. In essence, the First Circuit reduced aboriginal title to a "traditional" (read fee simple) property interest, 497 F.3d at 36, Pet. App. 43, and thereby limited the Settlement Act's extinguishment provisions to "merely resolving the claims that had clouded the titles of so much land in Rhode Island. . . . " *Id.* at 35. Pet. App. 40. Properly read, however, the Settlement Act's extinguishment of aboriginal title does more than just clear the title of private property owners. It also prohibits the creation of tribal territorial sovereignty in Rhode Island, whether through trust or otherwise.

Aboriginal title describes a *sui generis* set of rights and interests in land having little in common with "traditional" property ownership. Felix S. Cohen,

Handbook of Federal Indian Law 472 (Rennard Strickland ed. 1982) (discussing the tribal estate as a unique form of collective property ownership with no known analog in Anglo-American property law). Although Indian tribes holding land by aboriginal title enjoy full beneficial use of that land, they do not possess legal title to it. Instead, the ultimate legal title to aboriginal land is held by the sovereign. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). Land held by tribes under aboriginal title cannot be alienated without the consent of the United States. 25 U.S.C. § 177; 414 U.S. at 667-68 (Indian tribes may not freely alienate land they hold under aboriginal title); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (Indian tribes' power to "dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."). Since aboriginal title is not a property interest protected by the Fifth Amendment's takings clause, land so held may be "taken" by the federal government without any constitutional obligation to pay for it. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (aboriginal title lands can be "fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.").

By these measures, aboriginal title is less than a "traditional" fee simple interest in land. In other ways, however, it is more – much more. For almost 200 years, this Court has recognized that Indian

tribes have a significant sovereignty interest in their land. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 690-91 (1993) (Cheyenne Sioux Tribe's unabrogated "right . . . of 'absolute and undisturbed use'. . . . encompass[es] the right to exclude and to regulate"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("This Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."); *Wheeler*, 435 U.S. at 323 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); *Worcester*, 31 U.S. (6 Pet.) at 556-57 ("[f]rom the commencement of our government" Congress has treated Indian tribes as nations and considered them as "distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ."); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574 (Indians holding land under aboriginal title have the right "to use [the soil] according to their own discretion."); *see also* Felix S. Cohen, Handbook of Federal Indian Law § 15.04 [2] at 969 (N.J. Newton et al. eds. 2005) ("Original Indian title, also known as aboriginal Indian title, refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance.").[13]

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[13] That Indian tribes possess a sovereignty interest in their land is recognized by historians and legal scholars alike. *See, e.g.*, William Cronon, Changes in the Land 58 (Arthur Wang ed.

(Continued on following page)

This Court most recently affirmed that the exercise of territorial sovereignty is an inherent attribute of the aboriginal title estate in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). In *Sherrill*, the Oneida Indian Nation purchased fee title to two parcels of land within what had once been the Oneida's historic reservation. Relying on prior recognition of the Oneida's aboriginal title to that land, the Oneida argued that its reestablished aboriginal title would allow it to exercise tribal "sovereign dominion" over the parcels. *Id.* at 213.

Crucially, the Oneida were not attempting to use aboriginal title as a means of gaining physical possession of land owned by others. Indeed, the Oneida purchased the parcels and owned them in fee. Instead, the sole reason for the assertion of aboriginal title was to extend tribal sovereignty over the parcels by removing them from state jurisdiction (and its

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Farrar, Straus & Giroux 2003) (1983) (discussing New England Indians' conception of real property as including both individual ownership of land and collective sovereignty over territory); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 662 (2003) ("a congressional recognition of tribal property, or a grant of property to a tribe for the purpose of establishing an Indian reservation, presumes not only a recognition of property rights but a recognition of tribal sovereignty within the territory in question. After all, ownership of the land was in the tribe, and the tribe is a political entity that would determine how to use the land by exercising its sovereign regulatory powers and not just its ownership rights.").

concomitant taxing power). If aboriginal title were nothing more than a fee simple interest in land, lacking sovereign jurisdictional import, this Court would have ended the case right there – by holding that aboriginal title was insufficient to insulate the Oneida from taxation. Instead, this Court nowhere disagreed with the Oneida's core position that when an Indian tribe holds both fee title and aboriginal title to land, it owns the land and may exercise "present and future Indian *sovereign* control" over the land. *Id.* at 219-20 (emphasis added). The Oneida lost their bid to regain sovereign control over the parcels not because aboriginal title lacks a sovereignty interest; but rather, because aboriginal title was lost through laches. *Id.* at 216. *Sherrill* thus presumes the fundamental point that aboriginal title – unlike fee title – includes Indian sovereignty over land.

3) Trust title is essentially aboriginal title under a different name

The issue presented here is not in whether Congress has totally extinguished aboriginal title in Rhode Island – it clearly has. The question is the legal effect of that complete extinguishment on the Secretary's ability to establish sovereign territory for the Tribe. While the First Circuit dismissed the extinguishment of aboriginal title as irrelevant to the establishment of trust title, 497 F.3d at 35-36, a simple comparison of the aboriginal title estate to the

trust estate demonstrates that, in every important respect, they are the same.

As discussed above, Indian tribes holding land under a claim of aboriginal title do not possess legal title to that land; ultimate title is in the United States. The same is true for trust land. Indian tribes do not possess legal title to trust land; ultimate title is in the United States. 25 U.S.C § 465 ("Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired . . . "). Just as Indian tribes holding land under aboriginal title cannot alienate their land without the consent of the United States, they also cannot alienate trust property without the consent of the United States. 25 C.F.R. 152.22(b) (imposing a blanket restriction on alienation against any tribal lands held in trust by the United States, unless authorized by federal statute and approved by the Secretary). Moreover, just as there is no constitutional obligation to compensate tribes for the seizure of land held by aboriginal title, there is no constitutional obligation to compensate tribes for the taking of trust land. That is because, like aboriginal title land, tribes do not hold the underlying fee to trust land. Of course, as with aboriginal title land, tribes enjoy full beneficial use of trust land even though they do not hold legal title to it. Thus, the tribal possessory interest in aboriginal title land and the tribal possessory interest in trust land is identical.

A tribe's sovereignty interest in aboriginal title land and trust land is, likewise, identical. On trust land – just as on land held under aboriginal title – Indian tribes exercise territorial sovereignty to the exclusion of state laws. *Sherrill*, 544 U.S. at 220-21 (When the Secretary converts land to unrestricted trust for an Indian tribe under Section 465 of the IRA, he "reestablish[es] sovereign authority over territory" for that tribe); *see also Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978) ("When Congress provided in § 465 for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation."). Land converted to unrestricted trust is exempt from state and local taxation. 25 U.S.C. § 465. Indian trust land is also generally exempt from state and local land use regulation. 25 C.F.R. 1.4; *see also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664-66 (9th Cir. 1975) (Congress intended lands held in trust under the IRA to be free of state regulation). In short, when the Secretary converts land to trust for tribes under Section 465 of the IRA, he establishes a land base over which an Indian tribe can exercise territorial sovereignty to the general exclusion of state laws. This is precisely the jurisdictional allocation that exists on land held by tribes under a claim of aboriginal title.

Thus, the essential attributes of aboriginal title and trust title are the same. Both describe a specialized form of occupancy unique to Indian tribes. Both aboriginal and trust estates permit tribes full beneficial use of the land. Neither estate confers fee title ownership on the resident tribe. Tribes cannot freely alienate land held by aboriginal title and they cannot alienate land held in trust; both require the consent of the sovereign. There is no constitutional obligation to compensate land taken from Indians holding either by under aboriginal title or by trust. Yet, both estates are largely exempt from state law and, as a result, provide a locus for tribes to exercise territorial sovereignty subject only to the United States.

4) Where Congress extinguishes aboriginal title, it necessarily prohibits trust

Where Congress extinguishes the aboriginal title estate, no administrative agency can reestablish that estate simply by calling it a different name. When Congress extinguished aboriginal title in Rhode Island, it abolished the prototypical Indian estate. The IRA, by contrast, returns to Indian tribes land lost through allotment and it returns that land, not in fee simple, but in the prototypical Indian estate. There is no difference between the IRA trust estate and the aboriginal estate because Congress intended

the former to replicate the latter.[14] Where Congress extinguishes aboriginal title, therefore, it necessarily prohibits trust conversions under the IRA because aboriginal title and trust title are the same form of land tenure.

The First Circuit did not directly dispute that trust title and aboriginal title operate in the same manner, both endowing an Indian tribe with territorial sovereignty while divesting a state of its jurisdiction by like measure. The First Circuit, however, relying on *Sherrill*, held that "[h]owever aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty over land." 497 F.3d at 36. Pet. App. 42. *Sherrill*, however, involved no post-IRA act of Congress. It merely held that when the Oneida lost sovereign control over its territory through inaction, "standards of federal Indian law and federal equity practice" prevented the Oneida from unilaterally "reviving" that former sovereignty. 544 U.S. at 203, 214 (Oneida may not "rekindl[e] embers of sovereignty that long ago grew cold."). Where the Oneida allowed its sovereignty to lapse and acquiesced to the exercise of state sovereignty instead, this Court stated that "Section 465 [of

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[14] As discussed above, the IRA was intended to return land to Indians lost as a result of the federal policy of allotment. It attempted to "reorganize" or put back together the unique tribal relationship to land. As a result, the nature of the title returned to tribes via the IRA replicates, to the greatest extent possible, the land tenure held by tribes prior to allotment.

the IRA] provides the proper avenue for the [Oneida] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221. Thus, *Sherrill* stands for the proposition that where an (otherwise IRA qualified) Indian tribe[15] relinquishes its claim to territorial sovereignty through inaction, it may nevertheless regain sovereign control over territory through Section 465 of the IRA – if no later act of Congress precludes that result.

There is a world of legal difference between a tribe's voluntary relinquishment of its claims to territorial sovereignty and a congressional extinguishment of those claims. Congress has plenary – and exclusive – power to extinguish aboriginal title. *United States v. Alcea Band of Tillamooks*, 329 U.S.

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[15] The IRA does not apply to the Narragansett Indian Tribe as shown above. Indeed, the existence of the Settlement Act itself, a congressional act designed to redress the unique land loss claims asserted by the Tribe in Rhode Island, is additional evidence of the IRA's inapplicability to the Tribe. The IRA attempted to reverse what was considered a disastrous federal policy of allotting tribal lands to individual Indians and the resulting loss of those lands. The IRA attempts to restore a land base to tribes whose land had been carved up and doled out through allotments. Section 465 of the IRA is part of that remedy. There have never been federal Indian allotments in Rhode Island. Indeed, the Tribe's 1975 Lawsuits indicate that its base was lost not through allotments but through transfers of land allegedly made in violation of the Non-Intercourse Act. These are the same claims that have been addressed by the Settlement Act. Thus, from an historical perspective, it is the Settlement Act and not the IRA that applies to the recoupment and jurisdictional attributes of Indian land in Rhode Island.

40, 46 (1946). Once aboriginal title has been extinguished by an act of Congress, it cannot be revived except by Congress.

In Rhode Island, unlike New York, Congress affirmatively extinguished aboriginal title and all Indian claims involving land. Yet, the First Circuit held that, in relation to the establishment of Indian territorial sovereignty in Rhode Island, the congressional extinguishment of aboriginal title (as opposed to a mere lapse of that title) was "beside the point." 497 F.3d at 36. Pet. App. 42. The legal fact, however, that Congress extinguished the aboriginal estate in Rhode Island, including any Indian territorial sovereignty interest, *is the point* and mandates deference to the will of Congress. In Rhode Island, the 1978 Settlement Act's extinguishment provisions are outcome determinative – preventing the 1934 IRA's "alternative means" of allowing an administrative agency to revive or reestablishing Indian sovereignty over land, absent another act of Congress.[16] When the Settlement Act extinguished aboriginal title throughout the State, it prohibited that form of land tenure and necessarily placed a future limitation on the exercise of tribal sovereignty over land in Rhode Island, including on

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[16] Tellingly, when this Court described the state of the Oneida's territorial sovereignty claims, it described the claims as "in repose," 544 U.S. at 221 n.14, "gr[own] cold," *id.* at 214 and not capable of being unilaterally "revived," *id.* at 219. Here, Congress itself described the state of the Narragansett territorial sovereignty claims as "extinguished"; in other words, extinct.

the Parcel. Had Congress specifically and affirmatively extinguished the aboriginal title claim of the Oneida, as it did the Narragansett, the notion of an administrative agency reestablishing Oneida territorial sovereignty would have been soundly rejected.

It is a common-sense proposition that where Congress has extinguished the aboriginal title estate, no administrative agency can reestablish that estate through the backdoor simply by calling it a different name. When Congress extinguished aboriginal title in Rhode Island, it abolished the prototypical Indian estate. By contrast, the IRA returns to Indian tribes the land they lost through allotment and it returns that land, not in fee simple, but in that prototypical Indian estate. There is no difference between the IRA trust estate and the aboriginal estate because Congress intended the former to replicate the latter. Where Congress extinguishes aboriginal title, therefore, it necessarily prohibits trust conversions under the IRA.

B. The Settlement Act's Extinguishment of All Indian Claims Involving Rights and Interests in Land Precludes Indian Territorial Sovereignty

The Settlement Act's broader extinguishment of all claims based on Indian interests in and rights involving land similarly slams the door shut on the future establishment and exercise of Indian territorial sovereignty in Rhode Island. If, as the First

Circuit held, the extinguishment of aboriginal title merely eliminates "traditional" property claims, then as a matter of law and logic, this second provision must extinguish Indian claims based upon "interests in" and "rights involving" land beyond such traditional property claims, including Indian territorial sovereignty claims.[17]

Specifically, Congress extinguished the Tribe's claims – as well as those of any "successor in interest" to the Tribe – as follows:

> By virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the

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[17] The First Circuit held that this "all Indian claims" extinguishment "covers claims based on other forms of title, besides aboriginal title, that the Tribe might have held to land in Rhode Island prior to the Settlement Act." 497 F.3d at 36. The court thus accepted the Petitioners' core argument that this extinguishment provision eliminates claims based on "other forms" of title. One such "other form" of title is, of course, trust title. Following the First Circuit's own logic, therefore, claims based on trust title must, likewise, be extinguished.

> transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. § 1705(a)(3). A separate section of the Settlement Act similarly extinguished all other tribes' claims based on interests and rights involving land in Rhode Island. 25 U.S.C. § 1712(a)(3).

If the Secretary converts the Parcel to unrestricted trust under the IRA for the purpose of Indian housing, he will create Indian country.[18] *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 n.5 (1998) (When land is set apart by the federal government, and the land in question is under the superintendence of the federal government, it becomes "Indian country"); *United States v. McGowan*, 302 U.S. 535, 538-39 (1938) (holding trust land met set-aside and superintendency requirements of Indian country).

By its very definition, Indian country is a claim based upon an Indian "right or interest" in sovereignty over land. *See Alaska v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996) (identifying Indian country claims as being specifically barred by similar "all claims" extinguishment language

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[18] Indian country is land over which the federal government and the Indian tribe inhabiting it exercise primary jurisdiction, rather than the states. *Venetie*, 522 U.S. at 527 n.1.

in the Alaska Native Claims Settlement Act) (Fernandez, concurring), *rev'd on other grounds* by 522 U.S. 520 (1998); *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908, 922 (1st Cir. 1996) (identifying the assertion of Indian country as a "claim" to presumptive sovereignty rights over land); *accord* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 Conn. L. Rev. 605, 608 (2006) (noting that Indian sovereignty is a "claim" based on the transfer of title). As such, Indian country claims are barred by the Settlement Act.

Moreover, the "all Indian claims" extinguishment specifically includes claims based on Indian "use and occupancy" of land. 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). This Court has long held that Indian "use and occupancy" includes the exercise of Indian territorial sovereignty. *See, e.g., Bourland*, 508 U.S. at 690-91 (Cheyenne Sioux Tribe's unabrogated right of "absolute and undisturbed use" encompassed the lesser included power to regulate); *Montana v. United States*, 450 U.S. 544, 558-59 (1981) (where Crow Tribe had "absolute and undisturbed use and occupation" it could exercise regulatory jurisdiction over land). Thus, the exercise of Indian territorial sovereignty is barred in Rhode Island because Congress has prohibited all claims based on Indian "use and occupancy."

Finally, the prohibition against the assertion of any Indian claims based upon "any interest in or right involving land" encompasses any and all of the component assertions of Indian rights and interests

in land that naturally accompany trust: a tribal right to be free of state and local laws and regulations; a right to impose tribal law and regulations; the right to exercise tribal police power and to be free from the exercise of state police power. Each of these Indian rights and interests arising from the trust conversion has been extinguished by the "all Indian claims" language of the Settlement Act. It simply is not possible to regain territorial sovereignty without invoking and exercising the rights that the "all Indian claims" provision has expressly extinguished.

The First Circuit tried to side step the extinguishment of tribal rights and interests in land by claiming that any restrictions the Settlement Act may have placed on the Tribe did not apply to the Secretary. 497 F.3d at 36. Pet. App. 44. ("Ultimately, this entire line of argument by the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." (emphasis in original)). The plain text of the Settlement Act as well as the special relationship between the Tribe and the United States completely defeats this reasoning.

The Settlement Act not only bars the Tribe asserting sovereignty claims to land, it also bars the federal government from making the same claim on the Tribe's behalf. It does so by extinguishing the right of any "successor in interest" to the Tribe to make a claim against the State "based upon any interest in or right involving land [in Rhode Island]." 25 U.S.C. § 1705(a)(3). When the Secretary converts

tribal fee land to federal trust property, he becomes the Tribe's successor in (fee title) interest to the Parcel and he is, thus, bound by the broad extinguishment provisions of the Settlement Act.

In addition, the Settlement Act also contains a separate and independent prohibition against the United States from eclipsing the State's sovereignty on behalf of the Tribe by taking on trust duties and liabilities:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706 and 1707, of this title, the United States shall have no further duties or liabilities under [the Rhode Island Indian Claims Settlement Act] with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands . . .

25 U.S.C. § 1707(c).

This section limits the obligations of the United States as a land trustee for the Tribe. As a result, it prevents the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits any Indian tribe from doing directly: establishing tribal sovereign territory. The Settlement Act thus places a prospective limitation on the federal government's ability to take on any further land-based duties to the Tribe, including any duty to convert or hold land in trust for it. Moreover, any contention that the extinguishment provisions of the Settlement Act do not apply to the

Secretary fail in light of the special relationship that exists between the United States and federally-recognized Indian tribes like the Narragansett. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476 n.3 (2003) (recognizing the existence of a general trust relationship between Indian tribes and the United States, characterized as "a ward to his guardian"); *cf. Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (holding that whenever an Indian tribe asserts a claim under the Nonintercourse Act, the United States acts as a guardian for and fiduciary of the tribe). The Settlement Act's provisions bind the guardian, just as they bind the ward.

Accordingly, the Tribe's asserted right to or interest in exercising territorial sovereignty in Rhode Island has been foreclosed by Congress outside the Settlement Lands, just as it has been on the Settlement Lands. Likewise, the Tribe's right to invoke the federal government's protection against the uniform application of the State's laws to land anywhere in Rhode Island has been foreclosed by Congress.

C. The Plain Language and Purpose of the Settlement Act are Incompatible with Trust Under the IRA

The plain language of the Settlement Act, with its aboriginal title and "all claims" extinguishments and its limitations on further federal responsibilities over land compel the conclusion that the Tribe may

not establish or exercise territorial sovereignty in Rhode Island absent a subsequent act of Congress. That reading forecloses the aboriginal estate in Rhode Island, however denominated, and results in the elimination of all Indian claims to land.

The Settlement Act's legislative history evinces a clear intent to limit the extinguishment provisions to land claims that can be made uniquely by Indians. "As noted in the Settlement Agreement, extinguishment of Indian land claims is limited to those claims raised by Indians qua Indians, and is not intended to affect or eliminate the claim of any Indian under any law generally applicable to Indians as well as non-Indians in Rhode Island." H.R. Rep. 95-1453 (1978) reprinted in 1978 U.S.C.C.A.N. 1948, at 1955. A claim that an Indian tribe may exercise territorial sovereignty over land to the exclusion of state law is, of course, the *quintessential* Indian claim to land and one to which Congress was doubtless alluding by its use of the phrase "Indian qua Indian."

Reading the Settlement Act as precluding trust comports with the intent of the parties in settling the Lawsuits. When the State and the Tribe settled the Lawsuits, they agreed that federal legislation would be obtained "that eliminates all Indian claims of any kind, whether possessory, monetary *or otherwise*, involving land in Rhode Island. . . ." JMOU at 6 (emphasis added). J.A. 25. If the intent of the settlement had been to eliminate only conventional claims to land, the JMOU would have stopped at the extinguishment of possessory and monetary claims. Instead,

the settling parties, including the Tribe, agreed to seek federal legislation that went beyond the extinguishment of these conventional claims and further extinguished "other" claims that could be brought by Indian tribes, including sovereignty claims.

This interpretation of the Settlement Act makes sense and honors the disposition of the Lawsuits. It eliminates all further Indian claims to land, not just some ill-defined subset of those claims. It ensures the uniform application of the State's laws within its boundaries, a critically important feature given the state's tiny size and its densely packed population. Finally, after the Lawsuits were settled, the State, by agreement of all the parties, retained sovereign control over the Parcel. Wresting sovereign control over the Parcel from the State, whether by trust conversion or otherwise, would undo the allocation of sovereignty established by that settlement.

Conversely, reading the Settlement Act to permit the Secretary to convert the Parcel to trust makes little sense. Such a reading vitiates the essential purpose of the Settlement Act which was "intended to resolve once and for all the claims being asserted by the Narragansett Indians to lands in the Town of Charlestown." H.R. Rep. 95-1453 (1978) reprinted in 1978 U.S.C.C.A.N. 1948, at 1958. As this case amply demonstrates, permitting the reestablishment of the aboriginal estate in Rhode Island encourages, rather than resolves, claims between the Tribe, the State and its municipalities over their respective sovereign rights and interests in land. Moreover, reading the

Settlement Act to permit the Secretary to take land into trust for the Tribe yields an anomalous result. On the Settlement Lands – the heart of the Tribe's ancestral home – the Tribe remains subject to the State's civil and criminal laws and jurisdiction while everywhere else it may establish and exercise territorial sovereignty. Such a result is at odds with the clear language of the Settlement Act as well as with the intent of Congress and the parties in reaching a settlement of the Lawsuits.[19]

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[19] As discussed at length in the Governor's Brief, construing the Settlement Act as prohibiting the creation of Indian country in Rhode Island is also entirely consistent with this Court's interpretation of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* ANSCA preceded and was a model for the Settlement Act. The structure of both congressional acts evince an intent to divest Indian sovereign control over land – an intent four square contrary with placement of land into trust under the IRA.

CONCLUSION

For the reasons stated above, and in the briefs of the other Petitioners, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

**Counsel of Record*

PETITIONER'S BRIEF

Batch 819
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No. 07-526

In The Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTON, RHODE ISLAND,
Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER STATE OF RHODE ISLAND

PATRICK C. LYNCH
ATTORNEY GENERAL

Neil F.X. Kelly *
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284
NKelly@riag.ri.gov
Counsel for Petitioner
State of Rhode Island
* *Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. In the 1934 Indian Reorganization Act, Congress authorized the Secretary of the Interior to take land into trust for "all persons of Indian descent who are members of any recognized tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). The question presented is whether the 1934 Act empowers the Secretary to take land into trust for the Narragansett Indian Tribe, which was not recognized and not under federal jurisdiction until 1983.

2. In 1978, Congress codified a settlement agreement between Rhode Island and the Narragansett Indian Tribe. The Rhode Island Indian Land Claims Settlement Act provided the Tribe with settlement lands and prohibited any further Indian lands in Rhode Island by extinguishing all aboriginal title and "all claims ...based upon any interest in or right involving land." 25 U.S.C. §§1702(f), 1705, 1712. The question presented is whether the Rhode Island Indian Claims Settlement Act prohibits the Secretary of the Interior from taking land in Rhode Island into trust on behalf of an Indian tribe.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. The Rhode Island Claims Settlement Act ... 2

A. The Early History of the Colony, State, and Tribe 2

B. The Tribe's Land Claims Lawsuit and the Settlement 5

C. The Settlement Act 6

II Federal Acknowledgement of the Narragansett Indian Tribe 8

III. The Indian Reorganization Act 9

IV. Factual and Procedural Background 11

A. The Parcel and Trust Taking Decision .. 11

B. District Court Proceedings 13

C. The First Circuit Opinions 14

SUMMARY OF THE ARGUMENT 16

ARGUMENT 20

I. The Indian Reorganization Act Of 1934 Cannot Be Applied To The Narragansett Indian Tribe. 20

A. The Plain Language And Statutory Context Compel The Conclusion That The Term "Now" In Section 479 Means The Date Of The IRA's Enactment. ... 21

B. The Purpose And Legislative History Of The IRA Support Construing The Term "Now" In Section 479 To Mean The Date Of Enactment. 29

C. In *United States v. John*, This Court Construed The Term "Now" In Section 479 To Mean The Date of Enactment 33

D. The Secretary's Erroneous Interpretation Of Section 479 Is Not Entitled To *Chevron* Deference. 37

II. The Settlement Act Precludes The Secretary From Taking Rhode Island Land Into Trust For An Indian Tribe. 38

A. The Settlement Act Extinguished All Present And Future Tribal Claims Of Sovereign Authority Over Land Within The State. 39

B. Were The Secretary Permitted To Take Rhode Island Land Into Trust For The Tribe, It Would Give The Tribe Precisely What It Relinquished In The JMOU And Settlement Act. 48

1. Through The Settlement Act, The Tribe Relinquished Its Use And Occupancy Of Rhode Island Land, *i.e.*, Any Sovereign Authority To Regulate Rhode Island Land And Be Subject Only To Limited State Regulation . . 49

2. When Land Is Taken Into Trust Under The IRA And Becomes Indian Country, A Tribe Obtains Use And Occupancy Of The Land, *i.e.*, Sovereign Authority To Regulate The Land And Be Subject Only To Limited State Regulation. 52

C. Practical Considerations Counsel Against Permitting The Secretary To Take Rhode Island Land Into Trust Under The IRA. 56

CONCLUSION 58

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Native Village of Venetie Tribal Gov't.,
522 U.S. 520 (1998) 11, 20, 53, 55

Alaska v. Native Village of Venetie Tribal Gov't.,
101 F.3d 1286 (9th Cir. 1996) 56

Amoco Prod. Co. v. Southern Ute Indian Tribe,
526 U.S. 865 (1999) 23

BP America Prod. Co. v. Burton,
549 U.S. 84, 127 S. Ct. 638 (2006) 24, 25

Chevron USA, Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 15, 37

Chisom v. Roemer, 501 U.S. 380 (1991) 23

City of Sherrill v. Oneida Indian Nation,
544 U.S. 197 (2005) 55

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,
502 U.S. 251 (1992) 9, 29

Difford v. Sec. of Health & Human Services,
910 F.2d 1316 (6th Cir. 1990) 27

Doe v. Chao, 540 U.S. 614 (2004) 24

Duncan v. Walker, 533 U.S. 167 (2001) 26

Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 23

Gen. Dynamics Land Sys. v. Cline,
540 U.S. 581 (2004) 37

Gonzalez v. Oregon,
546 U.S. 243 (2006) 37

In re Heff, 197 U.S. 488 (1905) 30

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) ... 37

Johnson v. McIntosh, 21 U.S. 543 (1823) 3, 50

Kahawaiolaa v. Norton,
386 F.3d 1271 (9th Cir. 2004) 36

Koons Buick Pontiac GMC, Inc. v. Nigh,
543 U.S. 50, 65 (2004) 24, 25

LaRue v. DeWolff, Boberg & Assoc.,
552 U.S. ___, 128 S. Ct. 1020 (2008) 24

Lorillard v. Pons, 434 U.S. 575 (1978) 23

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) 30

Mitchel v. United States,
34 U.S. 711 (1835) 50, 51

Montana v. Kennedy, 366 U.S. 308 (1961) ... 27, 27

Montana v. United States,
450 U.S. 544 (1981) 54

Narragansett Indian Tribe v. Narragansett Elec. Co.,
878 F.Supp. 349 (D.R.I. 1995), *rev'd in part, aff'd in part*, 89 F.3d 908 (1st Cir. 1996) 11

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 54

Nw. Bands of Shoshone Indians v. United States,
324 U.S. 335 (1945) 50

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004) 46

Oneida Indian Nation v. County of Oneida,
414 U.S. 661 (1974) 48

Permanent Mission of India v. City of New York,
551 U.S. ___, 127 S. Ct. 2352 (2007) 24

Perrin v. United States, 444 U.S. 37 (1979) 25

Pub. Employees Ret. Sys. v. Betts,
492 U.S. 158 (1989) 44

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 17, 23

Russello v. United States, 464 U.S. 16 (1983) ... 26

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 25

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 53

United States v. Alcea Band of Tillamooks,
329 U.S. 40 (1946) 51

United States v. John,
437 U.S. 634 (1978) ..... *passim*

United States v. McGowan,
302 U.S. 535 (1938) 54

United States v. State Tax Comm'n.,
505 F.2d 633 (5th Cir. 1974) 36

United States v. Wheeler, 435 U.S. 313 (1978) ... 53

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 27

Weedin v. Chin Bow, 274 U.S. 657 (1927) 27

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 54

Worcester v. Georgia,
31 U.S. 515 (1832) 48, 50, 51

STATUTES

5 U.S.C. §706 13
18 U.S.C. §1151 ..... 10, 34
18 U.S.C. §1151(b) 12
25 U.S.C. §177 ..... 5, 48
25 U.S.C. §461 ..... 1, 9
25 U.S.C. §463 9
25 U.S.C. §465 ..... *passim*
25 U.S.C. §468 ..... 1, 25, 26, 27
25 U.S.C. §472 ..... 1, 26, 27
25 U.S.C. §476 36
25 U.S.C. §478 ..... 29, 34
25 U.S.C. §479 ..... *passim*
25 U.S.C. §1701 *et seq.* 7, 38
25 U.S.C. §§1702(d), (e) 5, 7
25 U.S.C. §1702(f) 6, 7
25 U.S.C. §1703 7
25 U.S.C. §1704 44
25 U.S.C. §1705 ..... *passim*
25 U.S.C. §1705(a) 43
25 U.S.C. §1705(a)(1) 40, 42, 46
25 U.S.C. §1705(a)(2) 40, 42, 52
25 U.S.C. §1705(a)(3) ..... *passim*
25 U.S.C. §1706(3) 42
25 U.S.C. §1706(a)(1) 7
25 U.S.C. §1707 ..... 1, 44
25 U.S.C. §1707(c) 7, 44
25 U.S.C. §1708 8
25 U.S.C. §1708(a) 15, 42
25 U.S.C. §1712 ..... *passim*
25 U.S.C. §1712(a) 43, 46, 47
25 U.S.C. §1712(a)(3) 8, 40, 46
25 U.S.C. §1724(d) 47
25 U.S.C. §1724(e) 47

25 U.S.C. §1752(7) 47
25 U.S.C. §1754(b)(7) 47
25 U.S.C. §1754(b)(8) 47
28 U.S.C. §1254(1) 1
42 U.S.C. §423(f) 28
43 U.S.C. §1601 *et seq.* 6
43 U.S.C. §1601(b) 44
43 U.S.C. §1603 ..... 43, 44
43 U.S.C. §1603(b) 43
2 Stat. 155 27
48 Stat. 984 9
48 Stat. 988 29
53 Stat. 851 34

REGULATIONS

25 C.F.R. §1.4(a) 10, 53
25 C.F.R. §1.4(b) 10, 53

OTHER AUTHORITIES

48 Fed. Reg. 6,177 (Feb. 20, 1983) 2, 8

73 Fed. Reg. 9,823 (Feb. 22, 2008) 57

Congressional Debate on Wheeler-Howard Bill (1934), *reprinted in The American Indian and United States*, Vol. III. (1973) 33

Deed of Ninigret to the Colony, March 28, 1709, *reprinted in* Report of Comm. 1881 4

H.R. Rep. 95-1453 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948 ..... 6, 7, 43, 46

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Hearing on S.2755 before the S. Comm. on Indian Affairs, 73d Cong. (May 17, 1934) 30, 31, 33

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899) .. 23

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Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated July 29, 1982 (available at http://64.62.196.98/adc/Nar/V001/D007.TIF) (last visited June 3, 2008) 4, 5, 8, 9

Royal Charter to Rhode Island Colony, King Charles II dated July 8, 1663 3

State of Rhode Island and Providence Plantations, "Narragansett Tribe of Indians, a Report of the Committee of Investigation, An Historical Sketch, and Evidence Taken Made to The House of Representatives 1880-1883", E.L. Freeman Providence 4, 5

U. S. Dept. of Interior Sol. Op. M-36975 (Jan. 19, 1993) 43

OPINIONS BELOW

The en banc First Circuit opinion (Pet. App. 1-81) is reported at 479 F.3d 15. The district court opinion (Pet. App. 84-136) is reported at 290 F.Supp.2d 167.

JURISDICTION

The en banc court of appeals entered its judgment on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007, and granted on February 25, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Reorganization Act of 1934 (the "IRA" or "1934 Act"), 25 U.S.C. §§461, 465, 468, 472, 479, and the Rhode Island Indian Claims Settlement Act (the "Settlement Act"), 25 U.S.C. §§1705, 1707, 1712, are reproduced in the statutory appendix to this brief. App., *infra*, 1a - 9a.

STATEMENT OF THE CASE

At issue in this case is the continuing vitality of two limits Congress imposed on the Secretary of the Interior's extraordinary authority to take land into trust for Indians. When the Secretary takes land into trust, he strips away the host state's sovereignty and jurisdiction and places them in the hands of a competing sovereign. Because the Secretary's power strikes at the core of our Federalism, Congress imposed limits on it. One limit is the definition of "Indian" in the Indian Reorganization Act of 1934,

which restricts the class of persons for whom the Secretary can take land into trust. When tribal membership is the basis of a trust application, Congress carefully specified that only tribes that were subject to the devastating consequences of the federal allotment policy qualify. And in the Rhode Island Indian Claims Settlement Act, Congress – at the Narragansett Tribe's behest – foreclosed the prospect of any further claim, interest in, or right to any sovereign Indian occupied lands in Rhode Island. The First Circuit's ruling has vitiated both limitations on the Secretary's power to transfer sovereignty and jurisdiction from the State to Indian tribes.

I. The Rhode Island Claims Settlement Act

A. The Early History of the Colony, State, and Tribe

The Narragansett Indians (the "Tribe"), along with the Niantic and Wampanoag Indians, were the earliest inhabitants of the area known today as the State of Rhode Island and Providence Plantations. William G. McLoughlin, *Rhode Island: A History* 2-9 (W.W. Norton & Co. 1978) ("McLoughlin").[1] One of the early Rhode Island colonists was Roger Williams. Williams, unlike other Puritan colonists, sought to maintain peaceful relations with the Native Americans. *Id.* at 2-9. He settled in the area of Providence with the permission of the Chief Sachems of the Narragansett

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[1] *See also* Final Determination for Federal Acknowledgement of Narragansett Tribe of Rhode Island, 48 Fed. Reg. 6,177 (Feb. 20, 1983) ("Federal Acknowledgement").

Indians; other settlements developed in Rhode Island in part because of the friendly relationship Williams had with the neighboring tribes. *Id.* at 4, 9.

In 1644, Roger Williams secured a charter from the civil authorities in England to fend off the other colonies' aggressive desire for land and to establish the political sovereignty of the Rhode Island settlements. *Id.* at 27-28. The pressures for land in Rhode Island continued, and in 1663 King Charles II issued a royal charter, which (among other things) authorized the Colony of Rhode Island to "direct, rule, order, and dispose of, all other matters" relating to "the making of purchases of the native Indians."[2]

The peaceful relations in Rhode Island came to an end with King Philip's War of 1675-1676. McLoughlin at 40. That conflict arose from the pursuit of land by the United Colonies of New England (the Massachusetts Bay, Plymouth, Connecticut, and New Haven colonies), and rivalries between Indian tribes of southern New England. *Id.* at 40-45. The war, principally between the United Colonies and the Wampanoags, "was not of Rhode Island's making, nor did the people of Rhode Island wage it." *Id* at 41-42. Rhode Island and the Narragansett Indian Tribe sought unsuccessfully to stay neutral. *Id.* at 42. By war's end, the settlements on the mainland of Rhode Island were destroyed and the Narragansetts were decimated. *Id.* at 44-45. Subsequently, some of the

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[2] Royal Charter to Rhode Island Colony, King Charles II dated July 8, 1663. *See Johnson v. McIntosh*, 21 U.S. 543, 601-04 (1823) (recounting circumstances surrounding 1663 Charter).

Tribe combined with the Niantics, who remained neutral, and became the Narragansett Indian Tribe. *Id.* at 44-45.[3] The Tribe remained essentially self-governing and became generally subject to the protection and supervision of the colony. *Id.*

In 1709 the Sachem of the Narragansetts, Ninigret, conveyed a deed to Rhode Island, which established a guardianship between the Colony and the Tribe.[4] In the deed, Ninigret exempted an eight-square-mile area for the Tribe in the area of present-day Charlestown.[5] The colonial reservation diminished over time by the

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[3] *See also* Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated July 29, 1982 at 2 (available at http://64.62.196.98/adc/Nar/V001/D007.TIF) (last visited June 3, 2008) ("Recommendation for Federal Acknowledgement").

[4] State of Rhode Island and Providence Plantations, "Narragansett Tribe of Indians, a Report of the Committee of Investigation, An Historical Sketch, and Evidence Taken Made to The House of Representatives 1880-1883" at 18, E.L. Freeman Providence ("Report of Comm."); Deed of Ninigret to the Colony, March 28, 1709, *reprinted in* Report of Comm. 1881, Appendix B at 26-28; Recommendation for Federal Acknowledgement at 2-4, 9. The 1709 Deed between the Colony and the Tribe arose due to the unsettled boundary dispute between the Connecticut Colony and Rhode Island and the land claims by the Atherton Company from the 1660's against the Narragansett's land. *See*, Deed of Ninigret at 26; *see also* McLoughlin at 40.

[5] Report of Comm. 1881, Appendix B at 26-28.

sale of land and encroachment.[6] The wardship ended and the Tribe disestablished in 1883 when the Tribe sold the remaining colonial reservation, consisting of approximately 927 acres of vacant tribal land, to the State for $5,000.[7]

B. The Tribe's Land Claims Lawsuit and the Settlement

In 1975 the Tribe brought suit against the State, and various landowners, claiming that 3,200 acres of aboriginal land in Charlestown were improperly alienated without congressional approval in violation of the Trade and Intercourse Acts, 25 U.S.C. §177. On February 28, 1978, after intense negotiations, the parties compromised and entered into the "Joint Memorandum of Understanding Concerning the Settlement of The Rhode Island Indian Land Claims" (the JMOU). J.A. 22a-35a. The essence of the agreement was that the Tribe would obtain 1,800 acres of the land it sought, on which it could establish its own hunting and fishing regulations (subject to minimum standards); in exchange, it agreed to relinquish all other Indian land claims.

More specifically, under the JMOU, the State agreed to provide approximately 900 acres of land to the Tribe, and the parties agreed to seek $3.5 million from the federal government for the Tribe to acquire an additional 900 acres. 25 U.S.C. §§1702(d), (e).

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[6] Report of Comm. 1880 at 16-20.

[7] Recommendation for Federal Acknowledgement at 4.

These 1800 acres are the "Settlement Lands." 25 U.S.C. §1702(f). The JMOU provided for the creation of a state corporation, controlled by the Tribe, to hold the Settlement Lands in trust for the Tribe's benefit. On these lands, except for local property taxation and hunting and fishing rights, "all laws of the State of Rhode Island shall be in full force and effect." JMOU ¶ 9, 11, 13; J.A. 24a-25a. Meanwhile, the Tribe agreed that:

> Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claims.

JMOU ¶ 6; J.A. 23a-24a. Exhibit C to the JMOU set forth proposed federal legislation, which specified that the Tribe would relinquish all claims to aboriginal title and any other uniquely sovereign claims, including subsequent claims for use and occupancy.

C. The Settlement Act

Pursuant to the requirements of the Trade and Intercourse Acts, the parties approached Congress in July 1978 to obtain its approval for the "extinguishment of Indian land claims ... limited to those claims raised by Indians *qua* Indians." H.R. Rep. 95-1453 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1955. Congress emphasized the importance of the bill "in that it follows the precedent set in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, by providing the Indians with an

opportunity to acquire a viable land base in the process of resolving their claims to aboriginal lands." H.R. Rep. 95-1453 at 1951.

In September 1978 Congress codified the JMOU in the Settlement Act, 25 U.S.C. §1701 *et seq*. Congress appropriated money for the Tribe to purchase 900 acres of private land, while the State contributed the other 900 acres to create the Settlement Lands. 25 U.S.C. §§1702(d), (e), (f), 1703. In return, the Act extinguished the Tribe's claim of aboriginal title in the United States, and specifically in Charlestown, Rhode Island. 25 U.S.C. §1705(a)(2). Moreover, Congress decreed that:

> all claims ... by ... the Narragansett Tribe of Indians or any predecessor or successor in interest ... arising subsequent to the transfer [of land] and based upon any interest in or right involving such land ... (including but not limited to claims for trespass damages or claims for use or occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. §1705(a)(3). Congress also determined that, after the "discharge of the Secretary's duties," "the United States shall have no further duties or liabilities under this subchapter" with respect to the Tribe or the Settlement Lands. 25 U.S.C. §1707(c).

Congress codified the requirement that a state corporation would "acquire, perpetually manage, and hold the settlement lands." 25 U.S.C. §1706(a)(1). And, consistent with the JMOU, Congress ordained that, except as agreed to and provided in the

Settlement Act, "the [s]ettlement [l]ands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. §1708. The Tribe did not receive federal recognition or have the Settlement Lands taken into trust in the Settlement Act. In addition, Congress comprehensively eliminated "all claims" by any other "Indian, Indian nation, or tribe of Indians . . . based upon any interest in or rights involving such land," including claims for use and occupancy. 25 U.S.C. §1712(a)(3).

II. Federal Acknowledgement of the Narragansett Indian Tribe

Little over a year after Congress enacted the Settlement Act, the Tribe applied to the Department of the Interior ("Department") to be acknowledged as an Indian tribe.[8] The Department officially acted on the application in 1982 and, on February 10, 1983, the Tribe received federal acknowledgement.[9]

During the process of acknowledging the Tribe, the Department found that "[t]here has been relatively little Federal contact" and "no [prior] Federal responsibility for or jurisdiction over the group."[10] In fact, the Office of Indian Affairs confirmed in correspondence with members of the Tribe in the 1920's that Congress had never provided any authority to "exercise the jurisdiction which is necessary to

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[8] Recommendation for Federal Acknowledgment at 15.

[9] Federal Acknowledgement, 48 Fed. Reg. 6, 177 (Feb. 10, 1983).

[10] Recommendation for Federal Acknowledgment at 8.

manage their affairs" because they had been "under the jurisdiction of the different states of New England." J.A. 18a-19a. The Office repeated this view in a March 18, 1937 letter to Rhode Island Congressman John M. O'Connell, which states that the Tribe has "never been under the jurisdiction of the Federal Government." J.A. 20a.

III. The Indian Reorganization Act

On June 18, 1934, Congress enacted the IRA, ch. 578, 48 Stat. 984, 25 U.S.C. §461 *et seq.*, and once again dramatically reoriented federal Indian policy. For much of the nineteenth century, federal policy was to segregate lands (reservations) for the "exclusive use and control of Indian tribes." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253 (1992). By contrast, the allotment policy of the late nineteenth century – under which reservation lands were allotted to tribe members individually – sought to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians" into society at large. *Id.* at 253-54 (discussing allotment policy). Through the IRA, Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-[allotment] era." *Id.* at 255. The IRA did this by, among other things, prohibiting further allotment of reservation lands and authorizing the Secretary of the Interior to restore surplus reservation lands to tribal ownership. 25 U.S.C. §§461, 463.

Of particular relevance here, Section 5 of the IRA, 25 U.S.C. §465, authorized the Secretary, "in his

discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing lands for Indians." Section 19 of the IRA, 25 U.S.C. §479, in turn, defines who is an "Indian" for purposes of the statute as follows:

> all persons of Indian descent [1] who are members of any recognized Indian tribe *now* under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and [3] . . . all other persons of one-half or more Indian blood.

(emphasis added). The Narragansetts were not a federally recognized Indian tribe in 1934.

Under Department regulations, when the Secretary takes land into trust under Section 465, "none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, . . . shall be applicable . . . ." 25 C.F.R. §1.4(a). The Secretary possesses the discretion to require compliance with state and local law under 25 C.F.R. §1.4(b), but only if and when he determines it would "be in the best interest of the Indian owner or owners in achieving the highest and best use of such property[.]" In addition, the Department maintains that land taken into trust under Section 465 becomes Indian country within the meaning of 18 U.S.C. §1151. *See* Brief for the United States in Opposition, *Roberts v. United States*, No. 99-174, at 14-18 (2000). When

land becomes Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question." *Alaska v. Native Village of Venetie Tribal Gov't.*, 522 U.S. 520, 531 (1998).

IV. Factual and Procedural Background

A. The Parcel and Trust Taking Decision

In 1991, the Narragansett Indian Wetuomuck Housing Authority (the "WHA") purchased a 31 acre parcel to build a proposed housing complex. Pet. App. 87. The parcel was included in the 1975 land claim by the Tribe, but did not end up as part of the Settlement Lands. The WHA obtained financing for the purchase of the parcel and the construction of the housing complex from the United States Department of Housing and Urban Development ("HUD"). *Id.* at 88. In 1992 the WHA conveyed the parcel to the Tribe with a deed restriction to place the property in trust with the federal government to provide housing for tribal members. *Id.* There is no HUD or other federal requirement that land be in trust to obtain financing, or for the construction, or habitation of the housing development.

Litigation ensued when the Tribe began construction of the housing without the required state and local permits and approvals. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F.Supp. 349 (D.R.I. 1995), *rev'd in part, aff'd in part*, 89 F.3d 908 (1st Cir. 1996). As the State argued and the district court found, the WHA's proposed housing project was detrimental to coastal and groundwater resources. *Id.*

at 355. The Tribe claimed, however, that the housing development was a "dependent Indian community" and thus "Indian country" pursuant to 18 U.S.C. §1151(b). The First Circuit ultimately held that the property was not Indian country because it was not owned or validly set aside by the federal government for the use and occupancy of the Tribe. 89 F.3d at 921.

Having failed in its first attempt to exempt the land from state regulation, the Tribe tried a different approach. Less than a year after the First Circuit's decision in *Narragansett Elec.*, the Tribe updated a pending trust application that had asked the Secretary to take the parcel in trust for the Tribe's benefit, based on its status as "a federally recognized and acknowledged Indian Tribe." Pet. App. 90.[11] The application and correspondence from the Tribe repeatedly requested that the land "be taken into trust free of State laws and regulation."[12] In March 1998, the Governor and Town of Charlestown were notified that the Secretary intended to take the 31 acre parcel into federal trust. Pet. App. 91; 162-64. The State, Governor, and Town appealed the Secretary's decision

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[11] Administrative Record (A.R.), Vol. I, Tab A (Narragansett Indian Tribal Resolution No. TC-93-0601 Trust). No members of the Tribe have ever sought trust lands based on the other two categories of "Indian" set forth in Section 479 of the IRA.

[12] Narragansett Indian Tribe of Rhode Island Trust Application dated July 17, 1997 (A.R. Vol. II, Tab D at 8) citing Memoranda of counsel dated Feb. 24, 1994 at 3 (A.R. Vol. II, Tab D, (5)) and Memoranda of counsel dated July 3, 1997 at 11 (A.R. Vol. II, Tab D, (6)).

to the Department's Board of Indian Appeals (IBIA), which affirmed. *Id.* at 91.

B. District Court Proceedings

The State, Governor, and Town ("Petitioners") appealed the IBIA decision to the United States District Court for the District of Rhode Island pursuant to the Administrative Procedures Act, 5 U.S.C. §706. Petitioners sought to enjoin the Secretary's action on a variety of grounds, including that it was contrary to the IRA and the Settlement Act. On cross-motions for summary judgment, the district court ruled in favor of the defendants. Pet. App. 84-136.

The district court rejected Petitioners' contention that, when Section 479 defines "Indian" to include "members of any recognized Indian tribe now under Federal jurisdiction," it referred to tribes under federal jurisdiction when Congress enacted the IRA, *i.e.*, as of June 18, 1934. The court concluded that, so long as the Tribe existed in 1934 and is presently federally recognized, it qualifies as an "Indian tribe" within the meaning of that clause. Pet. App. 110-113.

The district court also rejected Petitioners' contention that the Settlement Act precludes the Secretary from taking Rhode Island land into trust for Indians and converting the land into Indian country. The court concluded that the Settlement Act does not expressly address the operation of Section 465, and that, "[a]lthough Sections 1705 and 1712 reveal an intent to resolve *all* claims . . . that are premised upon the Narragansetts' assertions of aboriginal right, the

provisions do not reveal an intent to otherwise restrict the tribe's legal rights and privileges," including the right to seek trust acquisition of land under Section 465 once it became federally recognized. Pet App. 117-19.

C. The First Circuit Opinions

A panel of the First Circuit initially found that the Secretary could take the parcel into trust, but did not address whether the land would be subject to state law and jurisdiction. 398 F.3d 22, 36 (1st Cir. 2005). The First Circuit granted rehearing and, over a dissent, affirmed the district court judgment. 423 F.3d 45 (1st Cir. 2005).

The court of appeals ordered rehearing en banc, Pet. App. 139-140, and by a 4-2 vote affirmed. *Id.* at 1-81. On the IRA issue, the majority admitted that "[o]ne might have an initial instinct to read the word 'now'" in the 1934 Act to "mean the date of enactment of the statute, June 18, 1934." *Id.* at 19. The court found, however, that "there is ambiguity as to whether to view the term 'now' as operating at the moment Congress enacted it or at the moment the Secretary invokes it." *Id.* at 19-20. The court concluded that neither the statutory context (such as the IRA's use of the phrase "now or hereafter" elsewhere), policy, nor legislative history resolved the ambiguity. *Id.* at 20-28. The court also dismissed the relevance of *United States v. John*, 437 U.S. 634, 649 (1978), where this Court stated that the "1934 Act defined 'Indians'" to include "'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction' . . . ." (brackets in original). The

court of appeals described that equation of "now" with "1934" as mere "musings" that fell short of "being dicta." Pet. App. 23. The court then held that the Secretary's interpretation of Section 479 is "permissible," and therefore deferred to it under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 29.

The First Circuit also ruled that the Settlement Act does not preclude the Secretary from taking Rhode Island land into trust under the IRA. Pet. App. 37-50. The court stated that the Act does not explicitly limit the Secretary's authority, that implied repeals are disfavored, and that the State did not meet its burden of establishing such a repeal here. *Id.* at 38-39. In particular, the court concluded that 25 U.S.C. §§1705 and 1712 are "most naturally read as merely resolving the claims that had clouded the titles of so much land in Rhode Island." Pet. App. 41. "However aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty over land." *Id.* at 42. The court added that "[i]t would have been easy [for Congress] to extend the provisions of Section 1708(a) preserving state sovereignty [in the Settlement Lands] to cover all lands in Rhode Island owned by or held in trust for the Tribes." *Id.* at 47. Finally, while "[a]cknowledging the genuineness of the State's sense that its bargain has been upset," the court concluded that it lacked the authority to provide relief to the State. *Id.* at 48.

The dissent concluded that the Secretary's action conflicted with the language and intent of the Settlement Act. Judge Howard specifically found that Section 1705(a)(3) "forecloses any future 'Indian' land

claim of any type by the Tribe regarding land in Rhode Island. . . . Congress (and the parties) intended to resolve all the Tribe's land claims in the State once and for all." Pet. App. 74. He stated that "[i]t is neither logical nor necessary to find that Congress enacted legislation effectuating this carefully calibrated compromise between three sovereigns . . . only to permit the legislation to be completely subverted by subsequent agency action." *Id.* at 75. Judge Howard further observed that under the majority's reasoning, "the Tribe could swap the Settlement Lands for adjacent land and undo any limitations contained in the Settlement Act," which would be an "absurd result[]." *Id.* at 76. Judge Selya joined Judge Howard's dissent and added that the Act and its surrounding circumstances "suggests with unmistakable clarity that the parties intended to fashion a broad arrangement that preserved the State's civil, criminal, and regulatory jurisdiction over any and all lands within its borders." *Id.* at 79. In his view, "[i]t strains credulity to surmise, as does the majority, that the State would have made such substantial concessions including the transfer, free and clear, of 1800 acres of its land – while leaving open the gaping loophole that today's decision creates." *Id.* at 80.

After judgment entered, the First Circuit stayed the mandate of the judgment pending the Court's disposition of this case. Pet. App. 82-83.

SUMMARY OF THE ARGUMENT

I. Congress cabined the Secretary's authority to take land into trust under 25 U.S.C. §465 by limiting

who qualifies as an "Indian" for purposes of the IRA. In particular, where (as here) tribal membership is the purported basis of "Indian" status, the IRA only applies to "members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). Congress enacted the IRA on June 18, 1934; the ordinary and natural meaning of that phrase to the Congressmen who adopted it is that the tribe had to be recognized and under federal jurisdiction as of June 18, 1934. Because the Narragansett Tribe was not federally recognized and not under federal jurisdiction until 1983, it does not qualify as a "recognized Indian tribe now under federal jurisdiction."

The First Circuit erred in concluding that the statute is ambiguous and that, therefore, the Secretary's interpretation is entitled to *Chevron* deference. The only ambiguity posited by the First Circuit was that "now" could mean the present day if read from the perspective of someone reading the statute today (or any time after its enactment). That is not how statutes are interpreted. This Court has repeatedly held that statutes are interpreted from the perspective of the enacting Congress. The meaning members of *that* Congress would give to words controls; and the intentions of members of *that* Congress bear on the statute's meaning. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (in construing a word in a statute, "we may look to the contemporaneous understanding of the term"). The statutory context confirms that the word "now" in Section 479 refers to the date of the IRA's enactment. Other sections of the IRA use the phrases "now existing or established hereafter" and "now or

hereafter." This shows that when Congress wanted to encompass both the present and the future in the IRA it knew how to, and did not do so merely through the word "now." Moreover, the Secretary's interpretation would make the word "now" in Section 479 and the words "hereafter" in the other sections superfluous.

The statutory purpose and legislative history fully support that construction. The purpose of the IRA was to terminate the allotment policy and to undo some of the damage it caused. That purpose is most relevant to tribes that were federally recognized as of the statute's enactment and suffered under the allotment policy. And the legislative history shows that the word "now" was added to Section 479 based on the recommendation of the Commissioner of Indian Affairs, who stated that insertion of the word would "limit the act to Indians now under federal jurisdiction." Not surprisingly, the one time this Court construed Section 479, it read "now" to mean "1934." *John*, 437 U.S. at 649. That construction formed part of the Court's reasoning; it was not mere "musings." All told, Congress unquestionably answered the "precise question" presented here. The Secretary's interpretation, which repudiates that answer, must be rejected.

II. The second limit on the Secretary's ability to take Rhode Island land into trust is the Settlement Act. The Tribe, the State, and Congress came together in 1978 and comprehensively settled all claims to tribal land in Rhode Island. The unconditional language of the JMOU states that, in exchange for 1,800 acres of settlement lands, "Federal legislation shall be obtained that eliminates all Indian claims of

any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." J.A. 24a-25a. The plain language of 25 U.S.C. §1705(a)(3) accomplished that objective. It states that "all claims . . . arising subsequent[ly]" that are "based upon any interest in or right involving such land" – such as the claim that the 31 acres are Indian country and therefore immune from the State's laws and jurisdiction – "shall be regarded as extinguished as of the date of the transfer" of the 31 acres. The Tribe and the Secretary may not now seek to undo this extinguishment, and the parties' carefully wrought agreement, by resort to a land-into-trust application under Section 465. Congress has ordained otherwise.

By taking Rhode Island land into trust, and thereby creating federal Indian country for the first time in Rhode Island, the Secretary contravened the structure and context of the Settlement Act. The benefit the Tribe received in the JMOU and resulting Act was the use of the Settlement Lands, located in the heart of the Tribe's aboriginal home. Even there, though, the Settlement Act specified that state law applies, with only certain limited exceptions. Under the Secretary's position, however, state law can be ousted everywhere else in the State. Instead of being the place where tribal power is greatest, the Settlement Lands become the only place in the State that cannot become Indian country – a result that no one, including Congress, could possibly have intended. The Secretary's position also conflicts with Congress's intent to make the Settlement Act consistent with ANCSA, which has been long understood to preclude Alaska land from being taken into trust under Section 465.

The bottom line is the Secretary's position allows the Tribe to obtain everything it willingly bargained away in the JMOU and Settlement Act. The Tribe filed its 1975 lawsuit claiming aboriginal title and use and occupancy rights in the hope of obtaining sovereignty over Rhode Island lands and diminishing the State's sovereignty over those lands. That is precisely what occurs when the Secretary takes land into trust under Section 465. When land becomes Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question." *Native Village of Venetie*, 522 U.S. at 531. The Tribe settled its claims, however, and abandoned them in exchange for the 1,800 acres of Settlement Lands. This Court should give effect to the bargain reached in 1978 and codified by Congress, and bar any further "Indian occupied" lands in Rhode Island.

ARGUMENT

I. The Indian Reorganization Act Of 1934 Cannot Be Applied To The Narragansett Indian Tribe.

The 1934 IRA allows the Secretary of the Interior to take land into trust for, among others, "all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). At issue is whether Section 479 authorizes the Secretary to take land into trust on behalf of the Narragansett Indian Tribe – which was not federally recognized until almost 50 years after the IRA's enactment. The answer is unequivocally no. Statutes are construed from the perspective of the

Congresses that enacted them, and a member of Congress reading Section 479 in 1934 would naturally have read "now" to refer to the IRA's date of enactment, June 18, 1934. Moreover, only that construction is consistent with the IRA's use of the term "hereafter" in several other sections, gives the word "now" any meaning, and fulfills the statute's legislative purpose.

That is precisely how this Court interpreted the phrase in *United States v. John*, when it stated that Congress in the IRA "defined" the term "Indians" to include "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction." 437 U.S. at 649 (brackets in original). The Court in *John* did not engage in a full-blown statutory construction analysis of the phrase. But its reading of the provision was necessary to the resolution of the case, and it is the only plausible reading of the language. The First Circuit therefore erred in giving *Chevron* deference to the Secretary's position that the term "now" in Section 479 means "now and hereafter."

A. The Plain Language And Statutory Context Compel The Conclusion That The Term "Now" In Section 479 Means The Date Of The IRA's Enactment.

When Congress enacted the IRA, the plain meaning of the phrase "all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction" could not have been clearer: it referred to tribes under federal jurisdiction as of June 18, 1934. That meaning has not changed. The First

Circuit, however, adopting the Secretary's position, concluded "there is ambiguity as to whether to view the term 'now' as operating at the moment Congress enacted it or at the moment the Secretary invokes it." Pet. App. 19-20. In the First Circuit's view, it is unclear whether to read the statute from the perspective of a member of Congress in 1934, in which case "now" means June 18, 1934, or from the perspective of a person reading the statute years in the future, in which case "now" can mean that future year. This Court has repeatedly held, however, that statutes are construed from the perspective of the enacting Congress. The statutory context further confirms that "now" necessarily means June 18, 1934.

1. The IRA, like all federal statutes, must be read from the perspective of a member of the enacting Congress, which makes the ambiguity posited by the Secretary disappear. A member of Congress in 1934 reading the phrase "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction" would construe "now" to mean June 18, 1934. That construction is dispositive.

The various tools of statutory construction – plain language, statutory structure and context, drafting history, legislative history, etc. – have one thing in common: they all focus on the Congress that enacted the statute. The questions they seek to answer are "What did the statutory terms mean to the members of Congress who voted on the bill?", and "What was the intent of those members of Congress?"

It is well established that "[s]tatutory construction must begin with the language employed by Congress

and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks and citation omitted). And the relevant meaning of statutory terms is their meaning on the date of enactment. *See Lorillard v. Pons*, 434 U.S. 575, 583 (1978) ("where words are employed in a statute which had *at the time* a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary") (emphasis added). Thus, in construing a word in a statute, "we may look to the contemporaneous understanding of the term." *Roadway Express, Inc.*, 447 U.S. at 759; *see also Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of th[e] text as any ordinary Member of Congress would have read them, see [Oliver Wendell] Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899), and apply the meaning so determined.").

For example, in *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999), the Court assessed whether coalbed methane gas constituted "coal" within the meaning of the Coal Lands Acts of 1909 and 1910 based not on "what scientists know today," but on "whether Congress so regarded it in 1909 and 1910." The Court concluded "that the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance," not the gas. *Id.* at 874.

Because statutes are construed based on their meaning as of the date of enactment, this Court often

employs decades-old dictionaries to construe statutory terms. Two recent examples are *Permanent Mission of India v. City of New York*, 551 U.S. ___, 127 S. Ct. 2352, 2356 (2007) (construing an exception in the Foreign Sovereign Immunities Act of 1976 with the aid of a 1951 edition of *Black's Law Dictionary*); and *BP America Prod. Co. v. Burton*, 549 U.S. 84, 127 S. Ct. 638, 643-44 (2006) (construing a statute enacted in 1966 with the aid of a 1951 edition of *Black's Law Dictionary*).

Other tools of statutory construction similarly focus on the enacting Congress. The obvious purpose of inquiring into the background factors that motivated Congress to act is to help determine the enacting Congress's intent. *See, e.g., LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. ___, 128 S. Ct. 1020, 1025 (2008) (discussing the "risk that prompted Congress" to enact ERISA and "the kinds of harms that concerned the draftsmen of" the provision at issue). And "[t]hose . . . who look to legislative history," *Doe v. Chao*, 540 U.S. 614, 626 (2004), do so in the interest of "consider[ing] all available evidence of Congress'[s] true intent when interpreting its work product." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) (footnote omitted). The various components of legislative history – committee reports, hearings, floor statements, and the like – help to understand what was in the minds of the drafters of the legislation. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 861 (1992) ("in certain contexts reference to legislative history can promote interpretations that more closely correspond to the expectations of those who helped create the law"). Conversely, the views of

later Congresses cannot change the meaning of a statute. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199-200 (1963) ("[T]he intent of Congress must be culled from the events surrounding the passage of the 1940 legislation. [O]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940.") (internal citation and quotation marks omitted).

This may seem obvious, but it is necessary to demonstrate the basic flaw in the First Circuit's reasoning. To determine the meaning of a statute, one stands in the shoes of its enactors, not in the shoes of persons who might read the statute 50 years later. The only meaning a Congressman in 1934 would have given the phrase "any recognized Indian tribe now under federal jurisdiction" is a recognized tribe that, as of 1934, was under federal jurisdiction. That ordinary meaning controls. *See BP America Prod. Co.*, 127 S. Ct. at 643 ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

2. Reading "now" to mean "now as of 1934" is also compelled by the statutory context. *See Koons Buick*, 543 U.S. at 60 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). In the IRA, Congress clearly articulated when it wanted a provision or clause to apply prospectively. In Section 8 of the IRA, 25 U.S.C. §468, Congress provided that the Act does not apply to certain Indian holdings "outside the geographic boundaries of any Indian reservation now existing or

established hereafter." And in Section 12, 25 U.S.C. §472, Congress required the Secretary to establish standards for appointment "to the various positions maintained, now or hereafter, by the [BIA]." Congress's inclusion of the words "established hereafter" and "hereafter" following the word "now" in Sections 468 and 472, but not after the word "now" in Section 479, is telling. As this Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citations omitted). By excluding "hereafter" in Section 479, Congress expressed its intent that tribes recognized "hereafter" – after June 18, 1934 – not be embraced within the definition.

The Secretary's construction of Section 479 also violates the "cardinal principle of statutory construction" that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The Secretary's construction does this in two ways. First, it renders the term "now" in Section 479 meaningless. If any federally recognized tribe was covered by the phrase "any recognized Indian tribe now under federal jurisdiction," the word "now" would be unnecessary. Second, the Secretary's reading renders the words "established hereafter" and "hereafter" in Sections 468 and 472 superfluous. If the IRA is properly read from the perspective of a person reading the statute some

years post-enactment (for example, the Secretary in 1983), the word "now" would cover all present-day reservations (in the case of Section 468) and all positions presently maintained (in the case of Section 472). The words "established hereafter" and "hereafter" would add nothing.

3. Reading "now" in Section 479 to mean the date of the IRA's enactment is consistent with this Court's construction of the term "now" in a series of cases involving an immigration statute. The Act of April 14, 1802, 2 Stat. 155, provided that "children of persons who *now are*, or have been, citizens of the United States, shall, though born out of the limits of the jurisdiction of the United States, be considered as citizens thereof" (emphasis added). Congress reenacted the statute in 1872. In *Montana v. Kennedy*, 366 U.S. 308, 311-12 (1961), this Court found that Congress intended the 1802 provision to have retrospective application only – to "grant[] citizenship to the foreign-born children only of persons who were citizens of the United States on or before the effective date of the statute (April 14, 1802)." This Court further found that Congress amended the statute to make it prospective as well by removing the words of limitation – "now are or have been" – and replacing them with "heretofore born or hereafter born." *Id.* at 310. The Court reached the same conclusion in two prior cases. *See United States v. Wong Kim Ark*, 169 U.S. 649, 673-74 (1898); *Weedin v. Chin Bow*, 274 U.S. 657, 663-64 (1927).

The First Circuit countered that "Congress sometimes uses the word 'now' to refer to a time other than the moment of enactment," citing *Difford v. Sec.*

of Health and Human Services, 910 F.2d 1316 (6th Cir. 1990). Pet. App. 20. That case involved application of the Social Security Benefits Amendments of 1984, which established standards for determining when benefits may be withdrawn from persons who are no longer disabled. Congress provided that the benefits decision shall be based on "new evidence concerning the individual's prior or current condition," as well as on whether "the individual is now able to engage in substantial gainful activity." 42 U.S.C. §423(f). All that statute proves is that in an altogether different statutory context the term "now" can refer to a future time. In fact, the phrase "now and hereafter" would have made no sense in the context of Section 423(f), which by its very nature is addressing an event that takes place after the statute's enactment. This rare situation, where the term "now" necessarily refers to a future time, does not change the general rule that statutes are read from the perspective of their framers. And it does not create ambiguity in the IRA, where the only sensible reading of the term "now" – from the perspective of a Congressman in 1934 – is that it refers to 1934.

The First Circuit had only one response with respect to how other provisions of the IRA bear on the meaning of "now" in Section 479. Describing one of the Secretary's arguments, the court noted that "section 479 itself specifies the date of 'June 1, 1934' as the relevant date for determining eligibility based on 'residing within the present boundaries of any Indian reservation.'" Pet. App. 20. According to the Secretary, this shows that "had Congress wanted to require recognition of a tribe on the date of enactment, it would have specified that date, rather than using

the term 'now.'" *Id.* at 21. The logic of this argument is hard to grasp. Congress could not have used the word "now" in place of "June 1, 1934" because the date of enactment ("now") was June *18*, 1934. The only way to specify the date June 1, 1934 was to use that precise date. And even if Congress had used the date "June 18, 1934" elsewhere in the IRA, it would have proved nothing. Congress could have expressed the date June 18, 1934 as "now," "the date of enactment," or "June 18, 1934." There would be nothing strange or unusual about Congress picking and choosing among those options depending on the phrasing and syntax of particular sentences.[13] In the end, Congress's decision to use a specific date in one provision of the statute hardly suggests that Congress intended the word "now" to mean "now and hereafter."

B. The Purpose And Legislative History Of The IRA Support Construing The Term "Now" In Section 479 To Mean The Date Of Enactment.

This Court has recognized that the purpose of the IRA was to bring the federal government's "policy of allotment ... to an abrupt end." *Confederated Tribes of Yakima Nation*, 502 U.S. at 255. "The objectives of the allotment policy were simple and clear cut: to

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[13] The First Circuit referred to 25 U.S.C. §478 as requiring elections to be held "within one year after June 18, 1934." Pet. App. 21. That is not how the statute read when passed. As enacted by Congress in 1934, Section 18 (25 U.S.C. §478) referred to "within one year after the passage and approval of this Act." *See* 48 Stat. 988.

extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254 (citing *In re Heff*, 197 U.S. 488, 499 (1905)). Congress enacted the IRA to "[r]eturn to the principles of tribal self-determination and self-governance which had characterized the" pre-allotment policy. *Id.* at 255. Put slightly differently, the "intent and purpose of the" IRA "was to rehabilitate the Indian's economic life and to give him a chance to develop the initiatives destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

Those objectives have no foothold in Rhode Island, where there has never been any federal allotments or surplus lands, or any Indian tribes that were subject to that federal policy. More generally, those objectives have far less footing with respect to tribes that were not recognized as of 1934. Only tribes federally recognized by 1934 had their "tribal sovereignty" "extinguish[ed]" by the allotment policy and only such tribes needed a "[r]eturn to the principles of tribal self-determination and self-governance." Limiting the IRA's application to tribes recognized as of 1934, therefore, fully comports with the statute's underlying purposes.

The legislative history confirms that Section 479 was intended to reach only tribes that were subject to the pre-1934 allotment policy. The original version of Section 19 of the IRA read as follows:

> The term 'Indian' as used in this act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all

> persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all persons of one-fourth or more Indian blood.

Hearing on S.2755 before the S. Comm. on Indian Affairs, 73d Cong. 264 (May 17, 1934) ("Senate Hearing"). Congress modified this initial bill to make its scope more restrictive in two specific respects. First, with respect to the final category, Congress raised the blood requirement from one-fourth or more to one-half or more Indian blood. Second, and bearing precisely on the issue here, Congress changed "all persons of Indian descent who are members of any recognized Indian tribe" to "all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*."

The latter change arose directly from a colloquy during the Senate hearings between the Commissioner of Indian Affairs, John Collier, and members of Congress:

> The Chairman: But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their

> lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.
>
> Senator O'Mahoney: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner Collier: Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senate Hearing at 266-67. With that, the temporal limitation made its way into the IRA. And the person who proposed adding the phrase in dispute publicly stated that its effect would be to "limit the act to the Indians now under federal jurisdiction."

The First Circuit sought to diminish the import of Commissioner Collier's statement by noting that his solution to the Chairman's concern was not a very good one, being both ineffective (by allowing the IRA to apply to those California tribes "under the supervision of the Government of the United States" if they were "now under federal jurisdiction") and arbitrary (because Indians might be excluded from the IRA based on their tribes' status, not on their own Indian blood). Pet. App. 25. The efficacy of Commissioner Collier's solution is beside the point. Congress adopted

it after he expressly declared that it "would limit the act to the Indians now under federal jurisdiction." The First Circuit's assertion that "it is not clear whether ['now under federal jurisdiction'] was intended as a temporal limitation" cannot be taken seriously.[14]

C. In *United States v. John*, This Court Construed The Term "Now" In Section 479 To Mean The Date of Enactment.

As noted above, in *United States v. John*, this Court stated that the IRA "defined" the term "Indians" to include "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction." 437 U.S. at 649 (brackets in original). The First Circuit brushed aside this interpretation as mere "musings" that fell "short of being dicta." Pet. App. 23. That characterization of *John* missed the mark. The Court's construction of Section 479 *did* matter to its holding in the case. And its reading of "now" to mean "1934" strongly supports the conclusion that, in the words of *Chevron*, "Congress has directly spoken to the precise question at issue."

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[14] Further support in the legislative history for the proposition that its focus was on tribes subjected to the allotment policy is the following statement by Representative Edgar Howard, who co-sponsored the IRA: "For purposes of this act, [the definitional section] defines the persons who shall be classed as Indians. In essence it *recognizes the status quo* over the present reservation Indians and further includes all other persons of one-fourth Indian blood." Congressional Debate on Wheeler-Howard Bill (1934), *reprinted in The American Indian and United States*, Vol. III. (1973) (emphasis added).

At issue in *John* was whether land within the reservation of the Mississippi Band of Choctaw Indians constituted "Indian country" under 18 U.S.C. §1151. If it did, federal courts had jurisdiction over certain crimes committed on the reservation, and state courts did not. 437 U.S. at 635-37. To make that determination, the Court reviewed the long and difficult history of the Mississippi Choctaws. In short, in 1833 the Choctaw Indians entered into the Treaty at Dancing Rabbit Creek with the United States. In the Treaty, the Choctaws ceded ten million acres of land east of the Mississippi River to the federal government and in return were removed to the west. *Id.* at 641. Some of the Choctaws, however, remained in Mississippi. The Federal Government became "acutely aware" of that in the 1890's, and starting in 1918, Congress began appropriating funds to assist the Choctaws and to purchase land for individual Indians there. *Id.* at 643, 644.

The IRA accelerated the pace of change for the Mississippi Choctaws. They "were among the many groups who, before the legislation was enacted, voted to support its passage." *Id.* at 645. And within a year of its enactment, pursuant to Section 18, 25 U.S.C. §478, they voted to accept its provisions. *John*, 437 U.S. at 645-46. In 1939, Congress passed another Act, which provided that "title to all the lands previously purchased for the Mississippi Choctaws would be [held] 'in the [name of the] United States in trust for such Choctaw Indians of one-half or more Indian blood'" then residing in Mississippi. *Id.* at 646 (citing Ch. 235, 53 Stat. 851). Finally, in 1944, the Secretary of the Interior – based on the 1939 act – proclaimed the land held in trust for the Mississippi Choctaws as

a reservation "for the benefit of those members ... of one-half or more Indian blood." *Id.* In April 1945, the Mississippi Choctaws adopted a constitution pursuant to the IRA, which the Secretary quickly approved. *Id.*

With that background, the Court held that the Mississippi Choctaw reservation was "Indian country," concluding it became a "reservation" for purposes of Section 1151 in 1939 and, "if there were any doubt about the matter," in 1944. But the Court still had to respond to the lower courts' holding "that the 1944 proclamation had no effect because the [IRA] was not intended to apply to the Mississippi Choctaws." 437 U.S. at 649. The Court rejected that contention, stating:

> The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction," and their descendents who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood."

Id. at 650. The Court ruled that "[t]here is no doubt that persons of this description [persons of one-half or more Indian blood] lived in Mississippi, and were recognized as such by Congress and by the Department of Interior, at the time the [IRA] was passed"; "the Mississippi Choctaws were [therefore] not excepted from the general operation of the 1934 Act." *Id.*

Had the Court not concluded that "members of any recognized Indian tribe now under federal jurisdiction"

looked to the tribe's status in 1934, its reasoning would have been different. Although the Mississippi Choctaws were not recognized and under federal supervision as of 1934, they were by 1945. *See John*, 437 U.S. at 646 (observing that, "as anticipated by" Section 16 of the IRA, 25 U.S.C. §476, "the Mississippi Band of Choctaw Indians adopted a constitution and bylaws"); 25 U.S.C. §476 (authorizing "[a]ny Indian tribe, or tribes, residing on the same reservation" to adopt a constitution and bylaws). Were the Secretary's position here correct, the Court could have rejected the lower courts' contention that the IRA "was not intended to apply to the Mississippi Choctaws" on that ground alone. Instead, the Court looked to the final definition of "Indians," which was "persons of one-half or more Indian blood." The Court's construction of "members of any recognized Indian tribe now under federal jurisdiction" as dependent on the date of 1934 was far more than mere "musings."

Not surprisingly, all the circuit courts to consider Section 479 (other than the First Circuit) have interpreted it in the same manner as this Court in *John*. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (express language of Section 479 did not encompass any native Hawaiian group because there "were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii"); *United States v. State Tax Comm'n.*, 505 F.2d 633, 642 (5th Cir. 1974) (Section 479 "positively dictates that tribal status is to be determined as of June, 1934").

D. The Secretary's Erroneous Interpretation Of Section 479 Is Not Entitled To *Chevron* Deference.

Under the first step of *Chevron*, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue" by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 842. If Congress has answered the "precise question," the Court must reject an agency interpretation of a statute that is contrary to the Congress's expressed intent. *Id.* at 843. In this case, the "precise question" is whether Congress intended the phrase "any recognized Indian tribe now under federal jurisdiction" in Section 479 to embrace only tribes that were federally recognized and under federal jurisdiction on the date of the IRA's passage. For the reasons set out above, Congress *did* answer that "precise question," and its answer was yes.

Deference to an agency interpretation of a statute is permissible "only when the devices of judicial construction have been tried and found to yield no clear sense of Congressional intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9). Where "regular interpretive method" of statutory construction, however, "leaves no serious question," the agency is not entitled to *Chevron* deference. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). *Chevron* deference is therefore not granted simply because agencies are involved and a statute is claimed to be ambiguous. *Gonzalez v. Oregon*, 546 U.S. 243, 258 (2006). Under these basic principles, the Secretary's flawed construction of Section 479 does not merit deference.

The Secretary lacks the authority to take lands into trust under the IRA for the Narragansett Tribe, which did not become federally recognized or under federal jurisdiction until 1983. The 31 acre parcel in Charlestown, Rhode Island cannot, therefore, become trust land.

II. The Settlement Act Precludes The Secretary From Taking Rhode Island Land Into Trust For An Indian Tribe.

This case arises out of the settlement of lawsuits brought by the Narragansett Tribe that sought to establish its aboriginal title to 3,200 acres of land acquired by the State and various landowners in alleged violation of the Trade and Intercourse Acts. The parties' settlement of the dispute involved a straightforward *quid pro quo*: the Tribe received 1,800 acres of land – the heart of its sovereign aboriginal home – to be held in permanent state trust, where it could apply its own hunting and fishing regulations; in exchange, aboriginal title and all other claims to land anywhere in Rhode Island by the Narragansett Tribe and any other tribe were extinguished. The Settlement Act, 25 U.S.C. §1701 *et seq.*, codified that agreement. No longer could the Tribe, any of its members, any other tribe, or any other tribe's members claim sovereign regulatory authority over land in Rhode Island by virtue of their tribal or Indian status.

Under the Secretary's reading of the Settlement Act, which the First Circuit adopted, the Secretary has authority to eviscerate the benefits the State obtained from the settlement and the Act. In his view, the

Secretary is free to take tens of thousands of acres of land anywhere in Rhode Island into trust for Indian tribes, thereby converting that land into Indian country and severely compromising the application of state law there. Beyond the obvious violence that would do to the parties' bargain, it cannot be squared with the plain language and structure of the Settlement Act. The *quo* Rhode Island obtained in exchange for the *quid* of providing the Tribe 1,800 acres of its ancestral land was not a mere temporary extinguishment of aboriginal title and Indian country in the State.

A. The Settlement Act Extinguished All Present And Future Tribal Claims Of Sovereign Authority Over Land Within The State.

1. Congress extinguished all aboriginal title and all other tribal land claims within the State through two provisions of the Settlement Act: 25 U.S.C. §§1705 and 1712. Section 1705, through a three-step process, specifically extinguished the Tribe's claims within the State. The provision first decreed that, upon the satisfaction of certain conditions by the State (which occurred shortly after passage), "any transfer of land . . . anywhere within the United States from, by, or on behalf of . . . the Narragansett Tribe of Indians,. . . shall be deemed to have been made in accordance with the Constitution" and all pertinent federal statutes, including the Trade and Intercourse Act. Section 1705(a)(1). Subsection (a)(2) then provides that, "to the extent" any such transfer "may involve land" where the Narragansetts "had aboriginal title, subsection (a) of this section shall be regarded as an

extinguishment of such aboriginal title as of the date of said transfer." Finally, subsection (a)(3) declares that, as to any transfer of land subject to subsections (a)(1) and (a)(2), "all claims against . . . any State or subdivision thereof . . . by . . . the Narragansett Tribe of Indians, or any . . . successor in interest, [or] member . . . arising subsequent to the transfer and based upon any interest in or right involving such land . . . (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer."

Section 1712 uses virtually identical language, but its scope is different. It applies to transfers "of land . . . located anywhere within the State" (whereas Section 1705 applies nationwide); but it applies to transfers made "from, by, or on behalf of any Indian, Indian nation, or tribe of Indians" (whereas Section 1705 applies only to the Narragansetts). Taken together, Sections 1705 and 1712 extinguish all tribal land claims by the Narragansetts nationwide, and all tribal land claims by any Indian tribe or member within Rhode Island. Critically for the settlement, these provisions do not merely speak to the validity and impact of *past* transfers of land; by their terms they operate prospectively as well.

To understand the forward-looking nature of the Settlement Act, it is critical to recall that the Narragansetts were once the aboriginal occupants of what is now Rhode Island. *See*, *supra*, nn.1, 3. Accordingly, when Sections 1705(a)(3) and 1712(a)(3) state that "all claims . . . arising *subsequent to* the transfer and based upon any interest in or right

involving such land . . . shall be regarded as extinguished as of the date of the transfer" (emphasis added), they extinguish all future claims by the Tribe and its members, or any successor interest to any lands within the State. This extinguishment of *future* land-acquisition claims necessarily extends to seeking Secretarial action under 25 U.S.C. §465, the intended effect of which is to defeat application of ordinary state law by transferring to Indians equitable title to land.

The invalidity of the Secretary's action is highlighted by a straightforward application of the statutory language to the transaction. The 31 acres in question are among the lands that the Tribe sought to obtain in its original lawsuits; there is no serious dispute that they were lands transferred by the Tribe well before enactment of the Settlement Act. Section 1705(a)(1) deems that prior transfer of 31 acres legal as a matter of federal law. Section 1705(a)(2) decrees the "extinguishment of [any] aboriginal title" in the 31 acres "as of the date of said transfer." And Section 1705(a)(3) states that "all claims against . . . any State or subdivision thereof . . . arising subsequent to the transfer" of the 31 acres "and based upon any interest in or right involving such land" – such as the claim that the 31 acres are Indian country and therefore immune from the State's laws and jurisdiction – "shall be regarded as extinguished as of the date of the transfer" of the 31 acres. The Tribe undoes this extinguishment of its claims when it resorts to a land-into-trust application under Section 465; having agreed to be subject to Rhode Island law generally, it cannot seek a secretarial action to defeat the application of such law.

2. The structure of the Settlement Act and the context in which it was enacted confirm this. First, the core benefit of the agreement to the Tribe was that it would obtain use and occupancy of the 1,800 acres located at the very heart of its aboriginal lands. Yet even there, the Settlement Act provides that, with the exception of hunting and fishing regulations, "the civil and criminal laws and jurisdiction of the State of Rhode Island" shall apply. 25 U.S.C. §§1706(3), 1708(a). Allowing the Secretary to take any further Rhode Island lands into trust for the Tribe would produce the absurd result that the State's civil and criminal laws and jurisdiction can be reduced or eliminated anywhere in the State *except for one place* – the Settlement Lands. Instead of being the lands where Tribal power is at its zenith within the State, the Settlement Lands would be where potential Tribal sovereignty is at its nadir. As Judge Howard observed, the "Tribe could swap the Settlement Lands for adjacent land and undo any limitations contained in the Settlement Act." Pet. App. 76. It is inconceivable that Congress – whose principal object was to ratify the parties' settlement agreement – would have intended or countenanced such an outcome.

Second, the Settlement Act is the direct outgrowth of the bargain reached among the parties to resolve the Narragansetts' lawsuits. The first five paragraphs of the JMOU pertain to the establishment of the 1,800 acres of Settlement Lands. J.A. 22a-23a. Paragraph 6 of the JMOU then declares "[t]hat Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." J.A. 24a-25a. The language is unconditional. It does not say, "eliminates

all Indian claims of any kind *up until the point at which the Secretary, in his virtually unfettered discretion, reestablishes them.*"

Third, in effectuating that intent, Congress used "language [that] was consistent with the extinguishment language used in the Alaska Native Claims Settlement Act, 43 U.S.C. §1603(b)" and stated "that ANCSA instituted the relevant precedent for extinguishment in a settlement context." H.R. Rep. 95-1453 at 1953. In 1993, the Solicitor of the Department of the Interior reaffirmed a 1978 Solicitor opinion that the intent and purpose of ANCSA prohibits trust acquisitions by the Secretary. *See* U. S. Dept. of Interior Sol. Op. M-36975 at 107-08, 123 n.296 (Jan. 19, 1993). The Solicitor recognized that "ANCSA did reflect a new approach on an unprecedented scale in defining the relationship between the Alaska Natives and the Federal Government." *Id.* at 107. "Most significantly, the land and money assets provided in exchange for the extinguishment of Native claims were distributed to" new "state-chartered corporate organizations" rather than "existing IRA or traditional Native village organizations." *Id.* at 107-08. He concluded "Congress left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers." *Id.* The Secretary has abided by that policy, and has not taken land into trust on behalf of tribes since ANCSA's enactment. Given the intended marked resemblance between ANCSA §1603 and §§1705(a) and 1712(a) of the Settlement Act, the same result should obtain here.

The extinguishment provision of ANCSA is certainly no broader than the parallel provision in the

Settlement Act. ANCSA §1603 provides that "[a]ll aboriginal titles . . . in Alaska . . . are hereby extinguished," and declares that "[a]ll claims against . . . the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska . . . are hereby extinguished." It is true that ANCSA's Congressional Findings and Declaration of Policy states that settlement of the parties' dispute should be accomplished "without creating a reservation system or lengthy wardship or trusteeship," 43 U.S.C. §1601(b) – language that does not appear in the Settlement Act. Declarations of policy, however, are not operative law; it is the substantive provisions – such as Section 1603 – that determine the rights affected by a statute. *See Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 176 (1989) (a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate"). If the substantive provisions of ANCSA eliminated the Secretary's authority to take land into trust, so too did the similarly worded substantive provisions of the Settlement Act.

Finally, the Secretary's action is also inconsistent with Section 1707(c) of the Settlement Act, which states that "[u]pon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to" the Tribe "or the settlement lands." It makes no sense to argue, as respondents essentially do, that the Secretary has a duty to take land into trust under Section 465 *outside* the Settlement Area when he is

relieved of any obligation or authority to do so *within* such area.

3. The First Circuit "[a]cknowledg[ed] the genuineness of the State's sense that its bargain has been upset," but concluded that the Settlement Act's language compelled it to up-end the settled agreement. Pet. App. 48. It did not. None of the reasons posited by the First Circuit for its conclusion that the Settlement Act permits future acquisitions of trust land under the IRA has merit.

Most fundamentally, the court reasoned that, although Sections 1705 and 1712 "extinguish claims based on the purported invalidity of th[e] transfers" referred to in subsection (a)(1), "the IRA provides an alternative means of establishing tribal sovereignty over land." Pet. App. 41-42. That reasoning fails to account for subsection (a)(3), which specifically extinguishes tribal-based claims "arising *subsequent to* the transfer" (emphasis added). The First Circuit construed subsection (a)(3) as merely "cover[ing] claims based on other forms of title, besides aboriginal title, that the Tribe may have held to land in Rhode Island *prior* to the Settlement Act." Pet. App. 43 (emphasis added). Nothing in subsection (a)(3), however, limits its scope in that way. Instead, it explicitly extends into the future. Given the choice between construing the provision to effectuate the agreement Congress was ratifying and construing the provision to undermine that agreement, the court wrongly chose the latter alternative.

The First Circuit justified that choice, in part, by concluding that the State's construction "proves too

much." Pet. App. 43. Specifically, the court believed that the State's reading of the Act would bar the Tribe and its members from asserting "traditional property claims" – an outcome Congress and the parties did not intend. *Id.* Once again, the First Circuit failed to read the Settlement Act in a manner consistent with its manifest objectives. In the JMOU, the Tribe and the parties took great care to expressly state that the required federal legislation "shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island." JMOU ¶6; J.A. 23a-24a. The House Report reiterated that objective, stating that the "extinguishment of Indian land claims is limited to those claims raised by Indians *qua* Indians, and is not intended to affect or eliminate the claim of any Indian under any law generally applicable to Indians as well as non-Indians." H.R. Rep. 95-1453 at 1955.

The language of Sections 1705(a)(3) and 1712(a)(3) is fully consistent with the narrow reading the parties and Congress plainly intended. The statute as a whole is entirely focused on the rights and interests of the sovereign "Narragansett Tribe of Indians" as Indians *qua* Indians to unique Indian land claims such as aboriginal title. When subsection (a)(3) speaks of "claims . . . based upon any interest in or right involving such land," Congress was speaking of tribal "interest[s]" or "right[s]" such as aboriginal title that are tied to the land based upon Indian occupancy. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) (based on prior subject matter of statute, the term "failure to act" means "failure to take an *agency action*"). The conundrum posited by the First Circuit

is therefore a false one. The purpose of the JMOU and the ratifying legislation was to categorically remove for all time any dispensation from the applicability of Rhode Island law based on Indian occupancy of land except as specifically agreed upon with respect to the Settlement Lands.

Next, the First Circuit pointed to two subsequent Settlement Acts that more explicitly bar the Secretary from taking land into trust under the IRA. Pet. App. 46, 47 (citing the Mashantucket Pequot Settlement Act, 25 U.S.C. §§1752(7), 1754(b)(8), and the Maine Indian Claims Settlement Act, 25 U.S.C. §1724(e)). Neither settlement act supports the First Circuit's holding. Indeed, none of the cited provisions mentions the IRA or Section 465; instead each of these settlement acts provides independent authority for taking land into trust. Although those provisions do preclude the Secretary from holding certain land in trust for tribes, the sections immediately preceding them specifically *require* the Secretary to hold other land in trust for tribes. *See* Mashantucket Settlement Act, 25 U.S.C. §1754(b)(7) (requiring certain lands to be held in trust by the Secretary for the Pequots); Maine Indian Claims Settlement Act, 25 U.S.C. §1724(d) (same as to Maine Indians). Nothing in these later settlement acts, therefore, refutes the conclusion that the Settlement Act's extinguishment sections, Sections 1705(a) and 1712(a), preclude the future taking of Rhode Island land into trust.

Finally, the First Circuit reasoned that the Settlement Act does not foreclose the Secretary from taking land into trust under Section 465 because "what is at issue is not what the *Tribe* may do in the exercise

of its rights, but what the *Secretary* may do." Pet. App. 44. That argument fails for several reasons. First, the Tribe is asserting immunity from state and local laws, not the Secretary. Second, the Tribe initiated the trust process by applying to the Secretary; the Secretary did not unilaterally seek to take this land into trust. And third, the Settlement Act bars claims not only by the Tribe and its members, but also by "successors in interest" to them. 25 U.S.C. §1705(a)(3). When the Secretary takes land into trust on behalf of the Tribe, he becomes the successor in fee title interest to the Tribe.

B. Were The Secretary Permitted To Take Rhode Island Land Into Trust For The Tribe, It Would Give The Tribe Precisely What It Relinquished In The JMOU And Settlement Act.

Through the JMOU, as ratified in the Settlement Act, the Tribe agreed to relinquish all aboriginal title and all claims to use and occupancy with respect to Rhode Island land. The Tribe thereby relinquished all claims that Rhode Island law does not fully apply throughout the State (with limited exception in the Settlement Lands). The Tribe did so in settlement of lawsuits brought under the Trade and Intercourse Act, 25 U.S.C. §177, a law specifically designed to address when tribes may give up aboriginal title and concomitant use and occupancy rights. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (citing *Worcester v. Georgia*, 31 U.S. 515, 560 (1832)). Yet, under the First Circuit's decision, the Tribe is entitled to reacquire precisely those rights by means of the IRA and thereby limit the application of

state law on the affected lands. A review of the nature of the rights the Tribe relinquished and those that it would recoup shows that the Settlement Act foreclosed Section 465 trust.

1. Through The Settlement Act, The Tribe Relinquished Its Use And Occupancy Of Rhode Island Land, *i.e.*, Any Sovereign Authority To Regulate Rhode Island Land And Be Subject Only To Limited State Regulation.

Historically, and to the present day, the concept of aboriginal Indian title is tied to the aboriginal occupancy of land. Along with that aboriginal Indian occupancy came the concomitant right to use the land, to regulate activities on the land, and, in some instances, to be free of state regulation there. Each of these principles was reflected in federal policy that, dating back to the original Trade and Intercourse Act, protected tribal rights to such use and occupancy. The Settlement Act directly affected the Tribe's aboriginal title, use and occupancy rights, and the protections afforded it by the Trade and Intercourse Acts: the Settlement Act extinguished the Tribe's claims to title, use, and occupancy of land in Rhode Island; it therefore eliminated any claim that state regulatory authority is diminished in Rhode Island (apart from a narrow exception in the Settlement Lands); and it constituted a congressional settlement of all Indian land claims that had relied on federal laws designed to protect tribal use and occupancy rights.

The claims to aboriginal title, use, and occupancy that the Tribe relinquished in the Settlement Act

derived from principles established shortly after the nation's founding. This Court long ago recognized that the "right of [Indian] occupancy is considered as sacred as the fee-simple of the whites." *Mitchel v. United States*, 34 U.S. 711, 746 (1835). Consonant with that understanding, and with principles of natural law and the "doctrine of discovery," the Court acknowledged "the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right be extinguished by the United States." *Worcester*, 31 U.S. at 560. The Court explained that Indian nations are "distinct political communities" with authority over their territory that derived from "their own natural rights, as the undisputed possessors of the soil from time immemorial." *Id.* at 559; *see also Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945) (a tribe's claimed right to land based on "immemorial occupancy . . . has come to be known as Indian title and is likewise often spoken of as the right of occupancy").[15]

With that right to occupancy came the right to use the land. In *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823), the Court, through Chief Justice Marshall, held that although Indian tribes' "complete sovereignty, as independent nations, were diminished," tribes retained the right "to use [the land] according to their discretion." Chief Justice Marshall later elaborated that "the several Indian nations as distinct political

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[15] Unlike Georgia and most other states, Rhode Island law extended over tribes in their aboriginal land dating back to the early eighteenth century. *See, supra*, n. 3; *see also Worcester*, 31 U.S. at 580.

communities, hav[e] territorial boundaries within which their authority is exclusive." *Worcester*, 31 U.S. at 556-57; *see also Mitchel*, 34 U.S. at 746 (recognizing Indian tribes' "rights to its exclusive enjoyment in their way and for their own purposes").

The tribes' aboriginal rights – at least after adoption of the United States Constitution and surrender by the States to the national government of control over Indian affairs – affected the scope of state authority. This Court, for example, held in *Worcester* that "no state could interfere" with Indian tribes' "exclusive" authority on "lands they occupied." 31 U.S. at 560. Where, however, a tribe no longer possesses aboriginal title through an explicit congressional extinguishment of Indian occupancy rights, they stand in no different shoes than other persons with respect to the applicability of state law to that land. As the Court stated in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946), Indian title over land was "vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims."

Through the JMOU and Settlement Act, the Tribe abandoned its claims under the Trade and Intercourse Act to preexisting aboriginal title and use and occupancy rights with respect to land anywhere in Rhode Island. As discussed above, Section 1705(a)(2) of the Act specifically extinguished the Tribe's claims to aboriginal title, and Section 1705(a)(3) specifically extinguished any other claims the Tribe might have had to Rhode Island land, including "subsequent"

"claims for use and occupancy." The Tribe, as a sovereign, unmistakably requested that any right of use and occupancy it had be extinguished, and Congress acceded to that request in the exercise of its plenary power over Indian affairs. Congress confirmed that the Tribe would be sovereign but without Indian occupied lands other than those in the settlement area and without exemption from State law anywhere in Rhode Island. This left Rhode Island not only free and clear of all Indian land claims, but also free and clear of any impediment to the operation of its civil and criminal laws with respect to the Tribe.

2. When Land Is Taken Into Trust Under The IRA And Becomes Indian Country, A Tribe Obtains Use And Occupancy Of The Land, *i.e.*, Sovereign Authority To Regulate The Land And Be Subject Only To Limited State Regulation.

Federal trust is neither required nor necessary for the Tribe's proposed use of the disputed 31 acres as a housing development. The principal purpose and effect of placing that land into trust under 25 U.S.C. §465 is to provide an area of land for the Tribe where state regulatory law does not apply or applies in only a limited fashion. The First Circuit not only upheld the Secretary's assertion of that power, it agreed with the Secretary that the land thereby converted to Indian country. Pet. App. 5. The consequence of the First Circuit's dual holdings is that the Tribe is able to obtain the very use and occupancy rights, and concomitant limits on State regulatory authority, that

Congress had extinguished through the Settlement Act.[16]

The presence *vel non* of Indian country is the touchstone for allocating federal, tribal, and state authority with respect to Indians and Indian lands. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see also Native Village of Venetie*, 522 U.S. at 531 (where there is Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question").

Once land occupied by a tribe is deemed to be Indian country, the tribe has "the inherent power to prescribe laws for [its] members and to punish infractions of those laws." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Conversely, state regulation

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[16] Although the State disagrees with the conclusion that land taken into trust under the IRA necessarily becomes Indian country, that ruling is not before the Court. And even if trust land does *not* become Indian country, the court of appeals' ruling would substantially compromise state authority within the proposed trust lands. *See* 25 C.F.R. §1.4(a). It is true that the Secretary possesses the discretion to require compliance with state and local law under 25 C.F.R. §1.4(b) if he determines it would "be in the best interest of the Indian owner or owners in achieving the highest and best use of such property[.]" But the State did not bargain in the JMOU for the opportunity to commit the integrity of Rhode Island's laws and jurisdiction to discretionary secretarial determinations based on a highest-and-best-use criterion.

of tribal members living in Indian country is permitted only "in exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). An intricate body of law has developed with respect to tribal and state authority over nonmembers who enter, or interact with, Indian country. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981) (establishing general rules governing tribal regulation of nonmembers); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (describing balancing test to assess validity of state regulation of on-reservation activities by nonmembers). For present purposes, what matters is this: Even as to nonmembers, tribal authority is far greater, and state authority far less, on land that is Indian country than on land that is not.

The rights Indian tribes presently exercise in Indian country overlap considerably with the aboriginal rights of occupancy in the "soil" established in the early years of the Republic. Both sets of rights are premised on tribal occupancy of land that is ultimately owned by the federal government; both encompass Indians' right to "use" the land – to exercise sovereign regulatory authority there; and in both cases, state authority on the land is significantly diminished. Although the term "use and occupancy" was initially tied to aboriginal occupancy, it has also come to apply to territory beyond a tribe's ancestral home that has nonetheless become Indian country. *See United States v. McGowan* 302 U.S. 535, 539 (1938) (Indian country exists where land is "validly set apart for the *use* of Indians. It is under the superintendence of the government. The Government retains title to the lands which it permits the Indians to *occupy*.") (emphasis added)).

The eventuality is that the rights the Tribe will obtain if Rhode Island land is taken into trust under the IRA and converted to Indian country are the very rights the Tribe sought in its lawsuit, abandoned in the JMOU, and Congress extinguished in the Settlement Act. The situation under the First Circuit's decision would be no different had the Tribe not settled its lawsuit. "[T]he Federal government and the Indians involved, rather than the states, [would] exercise primary jurisdiction over" that land. *Native Village of Venetie*, 522 U.S. at 530.[17]

In sum, the Secretary cannot provide for the Tribe what Congress has prohibited. The Settlement Act does this directly by extinguishing all tribal claims "arising subsequent to the [pre-enactment] transfer" of land. 25 U.S.C. §1705(a)(3). What Judge Fernandez of the Ninth Circuit recognized with respect to Alaska lands following ANCSA is equally true of Rhode Island land following the Settlement Act:

> If ANCSA meant anything at all it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members. As far as the land was concerned, the regular state

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[17] In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215, 221 (2005), the Court held that, although the Oneida had long ago lost sovereign control over its ancient territory, trust pursuant to 25 U.S.C. §465 provides an avenue for a tribe to "reestablish sovereign authority over territory." *Sherrill* is readily distinguishable, however, since it did not involve a congressional enactment designed to eliminate Indian land claims within a state.

> and federal political entities would have and retain the necessary power. In short, it was no longer necessary to explicate and mull over previous Indian country concepts. That was the promise of the new era.

Alaska v. Native Village of Venetie Tribal Gov't., 101 F.3d 1286, 1304 (9th Cir. 1996) (Fernandez, J., concurring).[18] A "new era" also dawned in Rhode Island upon enactment of the Settlement Act, an era that would improperly end if the Secretary were permitted to take Rhode Island land into trust on behalf of the Tribe.

C. Practical Considerations Counsel Against Permitting The Secretary To Take Rhode Island Land Into Trust Under The IRA.

Rhode Island is the smallest and one of the most densely populated states in the country. The "Ocean State" was not developed from a great expanse of the public domain as western states were, nor did it develop with federal Indian country within its borders; indeed Indian country has never existed here. A person can easily drive from north to south through Rhode Island within an hour, and from east to west in approximately the same amount of time. This means the impact of *any* land being taken into trust by the Secretary and being converted into Indian country is severe.

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[18] Although the Ninth Circuit's majority opinion was reversed in *Venetie*, this Court agreed with many of the views expressed in Judge Fernandez's concurrence.

What is at stake, though, is far more than the State's potential loss of regulatory authority over 31 acres of land. The Secretary has the power to take hundreds or thousands of additional acres of land into trust in the future, at his virtually unlimited discretion – whether it is in the center of downtown Providence near the State House or in Charlestown. This is not an idle concern. Just this year, the BIA has recommended that more than 13,000 acres in New York be placed into trust under the IRA. 73 Fed. Reg. 9,823 (Feb. 22, 2008). Moreover, with trust land can come tax-free stores and gaming, even where those activities would otherwise contravene state law. Indeed, there is nothing that constrains or requires trust land to be used in conformity with the purposes or functions described in the initial trust application.

Thirty years ago, "Congress enacted legislation effectuating [a] carefully calibrated compromise between three sovereigns" that "provided for a delicate balancing of the parties' interests." Pet. App. 75 (Selya, J., dissenting). In exchange for the Tribe's receipt of land, Congress ensured that Rhode Island's civil and criminal laws and jurisdiction would continue to apply throughout the State. The First Circuit's opinion nullified that compromise. The court of appeals' conclusion that "the Tribe, with the contrivance of the Secretary's taking the Parcel into trust, [can] walk away from an arrangement that it helped to fashion and from which it has benefited over the years," *id.* at 79, is contrary to the JMOU, the Settlement Act, and established law. It should be rejected.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

PATRICK C. LYNCH
ATTORNEY GENERAL

*Neil F.X. Kelly
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284
NKelly@riag.ri.gov
Counsel for Petitioner
State of Rhode Island

**Counsel of Record*

June 6, 2008

APPENDIX

STATUTORY APPENDIX

25 U.S.C. § 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian

Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

25 U.S.C. § 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified

Indians shall hereafter have the preference to appointment to vacancies in any such positions.

25 U.S.C. § 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 U.S.C. § 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication--

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past

known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an

extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

25 U.S.C. § 1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed

or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

25 U.S.C. § 1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b) of this section--

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the

Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the

plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

RESPONDENT'S BRIEF

101

(13)

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SUPREME COURT, U.S.

No. 07-526

In the Supreme Court of the United States

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.

2. Whether the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*, prohibits the Secretary of the Interior from taking land in Rhode Island into trust on behalf of an Indian tribe.

TABLE OF CONTENTS

Page

Statutory and regulatory provisions involved 1
Statement 1
Summary of argument 9
Argument 11
I. The Secretary has authority under Section 5 of the Indian Reorganization Act to take land into trust for the Narragansett Tribe 11
A. The text, structure, purpose, and legislative history demonstrate that the IRA applies to a tribe that is federally recognized as of the statute's application 12
1. The Secretary has authority to take land into trust for a currently recognized "tribe" 12
2. The definition of "Indian" also looks to current status 14
3. The purposes and legislative history of the IRA reinforce the conclusion that Congress intended to extend its benefits to all federally-recognized tribes 21
4. This Court's decision in *John* does not require a different result 24
5. In any event, Congress made the statutory definition of "Indian" expressly inclusive, leaving a gap for the agency to fill 26
B. Because the Act does not unambiguously answer the question, the Secretary's reasonable interpretation of "tribe" and "Indian" is controlling 27
1. The Secretary's construction of "tribe" and "Indian" is reasonable in light of the IRA's text, structure, purpose, and history 28

Table of Contents—Continued: Page

2. The Secretary's regulatory interpretation is consistent with the Department's prior construction of the IRA, as well as other Indian statutes 30
3. Subsequent Indian legislation, including amendments to the IRA itself, demonstrates the reasonableness of the Secretary's interpretation 36
II. The Rhode Island Indian Claims Settlement Act either repeals the Secretary's trust authority under IRA Section 5 nor subjects new trust land to state jurisdiction 40
A. The text, structure, purpose, and history of the Settlement Act demonstrate that it did not repeal or limit the Secretary's trust-acquisition authority 41
B. A comparison to other Settlement Acts makes clear that the Rhode Island act does not impose the restrictions petitioners assert 46
C. Any doubt should be resolved in favor of preserving the Secretary's trust authority 51
Conclusion 53
Appendix — Statutory and regulatory provisions involved 1a

TABLE OF AUTHORITIES

Cases:

Alaska v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) 49
American Sur. Co. v. *Marotta*, 287 U.S. 513 (1933) 27
Burgess v. *United States*, 128 S. Ct. 1572 (2008) 26

Cases—Continued: Page

Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 27
City of Sherrill v. *Oneida Indian Nation*, 544 U.S. 197 (2005) 43, 44
Connecticut ex rel. Blumenthal v. *United States Dep't of the Interior*, 228 F.3d 82 (2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001) 47, 51
Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 35
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 11, 26, 27, 28
County of Yakima v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) 21, 52
Difford v. *Secretary of HHS*, 910 F.2d 1316 (6th Cir. 1990) 18
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 37
Franklin v. *United States*, 216 U.S. 559 (1910) 17
General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 17, 19
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 36
Heff, In re, 197 U.S. 488 (1905), overruled on other grounds, *United States* v. *Nice*, 241 U.S. 591 (1916) 21
Iowa Mut. Ins. Co. v. *LaPlante*, 480 U.S. 9 (1987) 52
Kahawaiolaa v. *Norton*, 386 F.3d 1271 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005) 26
Loving v. *United States*, 517 U.S. 748 (1996) 39

Cases—Continued: Page

Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 3, 22
Miami Nation of Indians of Indiana, Inc. v. *United States Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001), cert. denied, 534 U.S. 1129 (2002) ... 21
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 12
Montana v. *Kennedy*, 366 U.S. 308 (1961) 18
Morton v. *Mancari*, 417 U.S. 535 (1974) 2, 14, 21, 22, 41
Mountain States Tel. & Tel. Co. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985) 22
Narragansett Indians, In re, 40 A. 347 (R.I. 1898) 6
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 36
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 14, 26, 36
Nationwide Mut. Ins. Co. v. *Darden*, 503 U.S. 318 (1992) 13
New York Indians, 72 U.S. (5 Wall.) 761 (1867) 12
Nobelman v. *American Sav. Bank*, 508 U.S. 324 (1993) 20
Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) ... 4, 42
Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978) 27

Cases—Continued: Page

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 52
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) ... 29
South Carolina v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) 33
TVA v. *Hill*, 437 U.S. 153 (1978) 41, 51
Town of Charlestown, 18 I.B.I.A. 67 (1989) 52
United States v. *Celestine*, 215 U.S. 278 (1909) 2
United States v. *Fausto*, 484 U.S. 439 (1988) 37
United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1866) 5
United States v. *John*, 437 U.S. 634 (1978) 24, 25, 42
United States v. *Lara*, 541 U.S. 193 (2004) 21
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 28, 51
United States v. *Nice*, 241 U.S. 591 (1916) 21
United States v. *Rickert*, 188 U.S. 432 (1903) 5
United States v. *Reily*, 290 U.S. 33 (1933) 18, 19
United States v. *State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) 26

Constitution, statutes and regulations:

U.S. Const. Art. I, § 8, Cl. 3 13
Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717 17
Act of June 15, 1935, ch. 260, 49 Stat. 378 16
Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* 49
43 U.S.C. 1601 49

Statutes and regulations—Continued: Page

43 U.S.C. 1605 49
43 U.S.C. 1606 49
43 U.S.C. 1607 49
43 U.S.C. 1613 (2000 & Supp. V 2005) 49
43 U.S.C. 1617 (2000 & Supp. V 2005) 49
43 U.S.C. 1618 49
Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a *et seq.*:
25 U.S.C. 479a note 38
25 U.S.C. 479a-1 ..... 6, 29, 37, 19a
25 U.S.C. 479a-1(b) 38
Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* 38
25 U.S.C. 2719 ..... 39, 34a
25 U.S.C. 2719(b)(1)(B)(ii) 39
Indian General Allotment Act, ch. 119, 24 Stat. 388 2
Indian Reorganization Act, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*) 1, 1a
§ 14, 48 Stat. 987 (25 U.S.C. 474) 16
§ 18, 48 Stat. 988 (25 U.S.C. 478) 16, 17
Indian Reorganization Act, 25 U.S.C. 461 *et seq.* 1
25 U.S.C. 461 (§ 1) 3, 13
25 U.S.C. 462 (§ 2) 3, 39
25 U.S.C. 463(a) (§ 3(a)) 3
25 U.S.C. 464 (Supp. V 2005) (§ 4) 3
25 U.S.C. 465 (§ 5) ..... *passim*
25 U.S.C. 466 (§ 6) 3

Statutes and regulations—Continued: Page

25 U.S.C. 467 44
25 U.S.C. 468 (§ 8) 19
25 U.S.C. 470 (§ 10) 3
25 U.S.C. 471 (§ 11) 3
25 U.S.C. 472 (Supp. V 2005) (§ 12) 3, 19, 31, 12a
25 U.S.C. 474 (§ 14) 16
25 U.S.C. 476 (2000 & Supp. V 2005) (§ 16) 2, 30, 34, 13a
25 U.S.C. 476(f) 37
25 U.S.C. 476(g) 37
25 U.S.C. 477 (§ 17) 2, 39, 16a
25 U.S.C. 478 (§ 18) 2, 16, 39, 17a
25 U.S.C. 479 (§ 19) ..... *passim*
Maine Indian Claims Settlement Act, 25 U.S.C. 1721 *et seq.* 46
25 U.S.C. 1723(b) 48
25 U.S.C. 1723(c) 48
25 U.S.C. 1724(d) 46
25 U.S.C. 1724(e) (Supp. V 2005) 46
25 U.S.C. 1725(a) 46
25 U.S.C. 1725(b)(1) 47
25 U.S.C. 1725(e)(1) 47
25 U.S.C. 1725(f) 47
Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. 1751 *et seq.* 47
25 U.S.C. 1753(b) 48
25 U.S.C. 1753(c) 48

Statutes and regulations—Continued: Page

25 U.S.C. 1754(b)(7) 47
25 U.S.C. 1754(b)(8) 47
Non-Intercourse Act, 25 U.S.C. 177 ..... 6, 40
Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773 *et seq.* 48
25 U.S.C. 1773c 48
25 U.S.C. 1773g 48
Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.* 2
25 U.S.C. 1701 ..... 45, 52, 19a
25 U.S.C. 1701(b) 40
25 U.S.C. 1702(a) 49
25 U.S.C. 1702(d) 40, 42
25 U.S.C. 1702(e) 40, 42
25 U.S.C. 1702(f) 40, 42
25 U.S.C. 1705(a)(1) 40, 44
25 U.S.C. 1705(a)(2) 41
25 U.S.C. 1705(a)(3) 7, 41, 44
25 U.S.C. 1706 ..... 40, 49, 26a
25 U.S.C. 1706(a)(3) 42
25 U.S.C. 1707 ..... 40, 27a
25 U.S.C. 1707(c) 7, 41, 42, 50
25 U.S.C. 1708 (§ 9) 42, 28a
25 U.S.C. 1708(a) 7, 8, 42
25 U.S.C. 1708(b) 52
25 U.S.C. 1712(a)(1) 40, 44
25 U.S.C. 1712(a)(2) 41

Statutes and regulations—Continued: Page

25 U.S.C. 1712(a)(3) 41, 44
Social Security Disability Reform Act of 1984, 42 U.S.C. 423(f)(1)(B)(ii) 18
Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, 25 U.S.C. 1771 *et seq.* 47
25 U.S.C. 1771b(b) 48
25 U.S.C. 1771b(c) 48
25 U.S.C. 1771g 48
18 U.S.C. 1151 ..... 4, 42
20 U.S.C. 5508(d)(1)(E) 18
25 U.S.C. 1 28
25 U.S.C. 2 ..... 28, 11a
25 U.S.C. 9 ..... 28, 11a
25 U.S.C. 478-1 39
25 U.S.C. 1300b-14(a) 38
25 U.S.C. 1300i-8(a)(2) 38
25 U.S.C. 2202 ..... 39, 33a
28 U.S.C. 2409a(a) 4
47 U.S.C. 414 17
48 U.S.C. 748 18
25 C.F.R.:
Pt. 5 ..... 37a
Section 5.1 31
Pt. 11:
Section 11.2(c) (1966) 31
Section 11.100(d) 31

Regulations—Continued: Page

Pt. 52:
Section 52.1 (1966) 31
Pt. 81 ..... 36, 38a
Section 81.1 36
Section 81.1(i) 30
Pt. 83 ..... 7, 39a
Section 83.2 5
Section 83.3(a) 5
Section 83.7 5
Section 83.8 5
Section 83.12 5
Pt. 84:
Section 84.8 (1938) 32
Pt. 151 ..... 4, 26, 28, 29, 30, 48, 42a
Section 151.1 51
Section 151.2(b) 4, 11, 28, 30, 38
Section 151.2(c)(1) 4, 11, 28
Section 151.3(a) 4
Section 151.10 4
Section 151.10(f) 44
Section 151.11(d) 4
Section 151.12(b) 4
Pt. 161:
Section 161.2 (1938) 31
Section 161.2 (1949) 31
Pt. 163 ..... 49a
Section 163.1 31

Regulations—Continued: Page

Pt. 259:
Section 259.1 (1978) 31
42 C.F.R.:
Pt. 36:
Section 36.41 (1978) 31
Pt. 136:
Section 136.41 ..... 31, 50a
Law and Order Regulations, Indian Serv., 55 Interior Dec. 401 (1935) 31
§ 1, 55 Interior Dec. 401 31

Miscellaneous:

80 Am. Jur. 2d (2002) 15
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p. 32,132 29
p. 39,361 5
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p. 3452 51
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H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934) 22

Miscellaneous—Continued: Page

H.R. Rep. No. 1453, 95th Cong., 2d Sess. (1978) 44, 45, 49, 50
Letter from Acting Assistant Secretary–Indian Affairs to Rep. George Miller (Jan. 14, 1994) 36
Letter from Kent Frizzell, Acting Secretary of the Interior to David H. Getches, Native American Rights Fund (Oct. 27, 1976) 28
Memorandum from Deputy Assistant Secretary–Indian Affairs (Operations) to Assistant Secretary–Indian Affairs (July 19, 1982) 6
Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs (Oct. 1, 1980) 28
Op. Solic. Dep't of the Interior:
p. 668 (1936) 32
p. 706 (1937) 32
p. 724 (1937) 32
p. 747 (1937) 32
p. 1261 (1944) 33
p. 1394 (1946) 33
S. Rep. No. 972, 95th Cong., 2d Sess. (1978) 45
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Miscellaneous—Continued: Page

To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong. 2d Sess. (1934) 23, 24

United States Dep't of Interior, *Circular No. 3134, Enrollment under the Indian Reorganization Act* (March 7, 1936) 34, 35

Webster's New International Dictionary of the English Language (1917) 15

In the Supreme Court of the United States

No. 07-526

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-50a.

STATEMENT

In the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), Congress authorized the Secretary of the Interior to take "in trust for [an] Indian tribe" "any interest in lands, water rights, or surface rights to lands * * * for the purpose of providing land for Indians." 25 U.S.C. 465. Pursuant to that authority, the Secretary approved the application of the Narragansett Tribe (Tribe) to have a 31-acre parcel of

land located in Charlestown, Rhode Island, taken into trust for the purpose of low-income housing. Petitioners challenged that trust acquisition, claiming that the IRA does not authorize the Secretary to take land into trust for the Tribe, because the Tribe did not receive federal recognition until after the IRA's enactment, and that the Secretary's action was contrary to the Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq.* The Interior Board of Indian Appeals (IBIA) rejected petitioners' challenges (J.A. 48a-71a), as did the district court (Pet. App. 84-136). The court of appeals, sitting en banc, affirmed (Pet. App. 1-81).

1. a. *The Indian Reorganization Act.* In 1934, Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). That "sweeping" legislation, *ibid.*, manifested a sharp change of direction in federal Indian policy. It replaced the assimilationist policy characterized by the Indian General Allotment Act (Allotment Act), ch. 119, 24 Stat. 388, which had been designed to "put an end to tribal organization" and to "dealings with Indians * * * as tribes." *United States* v. *Celestine*, 215 U.S. 278, 290 (1909).

The IRA authorized Indian tribes to adopt their own constitutions and bylaws (§ 16 (25 U.S.C. 476 (2000 & Supp. V 2005)) and to incorporate (§ 17 (25 U.S.C. 477)). It also allowed tribes to decide, by referendum, whether to exclude their reservation from the IRA's application (§ 18, 25 U.S.C. 478). In addition, the IRA authorized the Secretary to take specified steps to improve the economic and social condition of Indians, including: adopt-

ing regulations for forestry and livestock grazing on Indian units (§ 6 (25 U.S.C. 466)), making loans to Indian-chartered corporations "for the purpose of promoting * * * economic development" (§ 10 (25 U.S.C. 470)), paying expenses for Indian students at vocational schools (§ 11 (25 U.S.C. 471)), and giving preference to Indians for employment in government positions relating to Indian affairs (§ 12 (25 U.S.C. 472 (Supp. V 2005))).

In service of the broader goal of encouraging the Indian tribes "to revitalize their self-government" and to take control of their "business and economic affairs," Congress also sought to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973). The IRA thus prohibited any further allotment of reservation lands (§ 1 (25 U.S.C. 461)), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2 (25 U.S.C. 462)), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a) (25 U.S.C. 463(a))), and prohibited any transfer of restricted Indian lands, with limited exceptions, other than to the tribe or by inheritance (§ 4 (25 U.S.C. 464 (Supp. V 2005))).

Of particular relevance here, Section 5 of the IRA authorizes the Secretary of the Interior, "in his discretion," to "acquire * * * any interest in lands * * *, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The acquired lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian." *Ibid.*

Section 19 of the IRA provides that the term "tribe" "shall be construed to refer to any Indian tribe, orga-

nized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. 479. Section 19 also provides that "Indian" "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," as well as "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." *Ibid.*

The Secretary has issued regulations implementing his authority to take land into trust. 25 C.F.R. Pt. 151. Those regulations define "Tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). The regulations define "individual Indian" as *inter alia*, "[a]ny person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). Those regulations also specify the factors that guide the Secretary's evaluation of land acquisition requests, 25 C.F.R. 151.3(a), 151.10, and require notice to state and local governments of a proposed acquisition and an opportunity for comment. 25 C.F.R. 151.10, 151.11(d). The regulations also provide a 30-day period after publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), to allow for a judicial challenge.[1] When land is taken into trust under Section 5, it becomes Indian country. See 18 U.S.C. 1151; see also, *e.g.*, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

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[1] After title is acquired, such a challenge would be barred by the Indian-land exception in the Quiet Title Act, 28 U.S.C. 2409a(a).

b. *Federal recognition of Indian tribes.* Historically, federal recognition of Indian tribes has been the exclusive province of the political Branches. See, *e.g.*, *United States* v. *Rickert*, 188 U.S. 432, 445 (1903); *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). Following passage of the IRA, the Interior Department considered several factors in determining whether a group was an Indian tribe eligible for the IRA's benefits. See Felix S. Cohen, *Handbook of Federal Indian Law*, 270-271 (1942) (*Cohen*). Those considerations included whether the group had treaty relations with the United States, been denominated a tribe by Act of Congress or Executive Order, had collective rights in tribal lands or funds, been treated as a tribe by other tribes, and exercised political authority. *Ibid.*

In 1978, the Secretary promulgated regulations, after notice and comment, establishing a uniform process for "acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. 83.2; see 43 Fed. Reg. 39,361 (1978); see also 59 Fed. Reg. 9280 (1994). The acknowledgment regulations require groups to establish a "substantially continuous tribal existence" and that they "have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3(a). It is not required that the group was under federal jurisdiction when the IRA was enacted in 1934. See 25 C.F.R. 83.7 (mandatory acknowledgment criteria), 83.8 (consideration of previous federal acknowledgment). Upon recognition, the tribe is "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes." 25 C.F.R. 83.12. In 1994, Congress required the Secretary to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services pro-

vided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1.

c. *Rhode Island Indian Claims Settlement Act.* The modern-day Narragansett Tribe is descended from two tribes that occupied the Rhode Island area before Europeans arrived. Memorandum from Deputy Assistant Secretary–Indian Affairs (Operations) to Assistant Secretary–Indian Affairs 1 (July 19, 1982) (*Recommendation for Acknowledgment*). In 1709, the colony of Rhode Island contracted with the Tribe to purchase some of the Tribe's land. That deed reserved to the Tribe an eight-mile square encompassing what is now Charlestown. *In re Narragansett Indians*, 40 A. 347, 355-356, 361-363 (R.I. 1898). In 1880, Rhode Island enacted legislation purporting to terminate the Tribe's sovereignty and to purchase virtually all of the Tribe's remaining lands for $5000. *Id.* at 363; *Recommendation for Acknowledgment* 4. The Tribe retained a small tract of commonly-owned land and continued to conduct annual meetings. *Ibid.* The Tribe also made several unsuccessful attempts to recover its land from Rhode Island (see, *e.g.*, *In re Narragansett Indians*, *supra*), but it did not establish a government-to-government relationship with the United States. See Pet. App. 144-147.

In 1975, the Tribe (then organized as a state-chartered corporation) sued the State of Rhode Island and private landowners, pursuant to the Non-Intercourse Act, 25 U.S.C. 177, to recover 3200 acres of its aboriginal territory. Pet. App. 10-11, 86. After multilateral negotiations, the parties settled the land claims in an agreement (J.A. 25a-38a) that was implemented by Congress in the Settlement Act. The Settlement Act provided 1800 acres of land (Settlement Lands) for the Tribe and expressly made those lands subject to the civil

and criminal law and jurisdiction of the State. 25 U.S.C. 1708(a); Pet. App. 11. In exchange, the Tribe agreed to the extinguishment of its aboriginal land claims and any claims that they had based on "any interest in or right involving" the lands previously transferred from them. 25 U.S.C. 1705(a)(3). The Act specifically anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," and provided that the Settlement Lands thereafter could not be alienated without the Secretary's approval. 25 U.S.C. 1707(c).

In 1983, the Secretary formally acknowledged the Narragansett Indian Tribe under 25 C.F.R. Pt. 83. 48 Fed. Reg. 6177 (1983). In 1988, the Secretary accepted the Settlement Lands in trust, pursuant to Section 5 of the IRA, subject to the Settlement Act's requirement (25 U.S.C. 1708(a)) that they are subject to state civil and criminal law and jurisdiction. Pet. App. 11-12, 87.

2. In 1992, the Tribe purchased the 31-acre parcel at issue here in fee. Pet. App. 4, 12. The parcel is "adjacent to the [S]ettlement [L]ands, across a town road." *Id.* at 12. In 1993, the Tribe applied to the Secretary to have that parcel taken into trust. In 1998, following a lengthy administrative process, the Department approved the Tribe's application "for the express purpose of building much needed low-income Indian Housing" through a contract with the United States Department of Housing and Urban Development. J.A. 45a-46a; see J.A 51a-52a (describing Tribe's need for land for housing). The IBIA affirmed. J.A. 48a-71a.

3. Petitioners then filed this action, challenging the trust acquisition on multiple grounds, all of which the court rejected. Pet. App. 100-135. As relevant here, the court rejected petitioners' contention that the phrase

"members of any recognized Indian tribe now under Federal jurisdiction" in the definition of "Indian" in Section 19 of the IRA restricts the Secretary's Section 5 trust-acquisition authority to tribes that were federally recognized when the IRA was enacted in 1934. *Id.* at 108-114. The court also rejected petitioners' claim that the Settlement Act precluded the Secretary from taking land outside the Settlement Lands into trust. *Id.* at 114-126.

4. Sitting en banc, the court of appeals affirmed. Pet. App. 1-81. The court unanimously held that the IRA authorized the Secretary to take land into trust for the Tribe. *Id.* at 17-37. The court concluded "from the text, context, and legislative history" that Section 19 of the IRA is "at least ambiguous as to whether the phrase 'now under federal jurisdiction' disqualifies tribes that were federally recognized after 1934." *Id.* at 28. The court further concluded that the Secretary's interpretation of his trust authority was reasonable and entitled to deference. *Id.* at 17-37.

The court also unanimously held that the Settlement Act did not preclude the Secretary from taking land into trust outside the Settlement Lands. Pet. App. 37-48; *id.* at 72 n.25 (Howard, J., dissenting); *id.* at 78 (Selya, J. dissenting). A majority of the court further concluded that the Settlement Act's provision subjecting the Settlement Lands to state civil and criminal law and jurisdiction (25 U.S.C. 1708(a)) does not extend to other lands in Rhode Island. Pet. App. 48-50. Judge Howard and Judge Selya dissented on that point. *Id.* at 71-81. In their view, the Settlement Act requires that any Indian trust land in Rhode Island remain subject to state law and jurisdiction. *Id.* at 72 & n.25; *id.* at 79.

SUMMARY OF ARGUMENT

The en banc court of appeals properly concluded that the Secretary is authorized to take the land at issue into trust under the Indian Reorganization Act (IRA).

1. Section 5 of the IRA authorizes the Secretary of the Interior to take land into trust for an "Indian tribe or individual Indian" for the purpose of providing land for Indians. 25 U.S.C. 465. Section 19 of the IRA broadly defines "tribe" to refer to, *inter alia*, "any Indian tribe." 25 U.S.C. 479. That separate definition of "tribe" plainly extends the Secretary's trust-acquisition authority to the Narragansett Tribe, without regard to when it received federal recognition. Giving full effect to the definition of "tribe" with respect to Section 5's trust authority, as well as other provisions of the IRA, furthers the IRA's overriding purpose of revitalizing tribes as political and economic entities. At a minimum, the IRA does not foreclose that interpretation of "tribe," which is embodied in the Secretary's regulations and is entitled to deference.

Even if the IRA's separate definition of "Indian" has some bearing on the Secretary's trust-acquisition authority for a "tribe," the definition of "Indian" is expressly inclusive, with several examples of persons encompassed by that term. The IRA's text, structure, purpose, and history all point to the conclusion that Section 19's first example—which includes members of "any recognized tribe now under Federal jurisdiction"—extends to persons who meet that description at the time the IRA is applied. Congress sometimes uses "now" in that fashion, particularly where, as here, the function the word serves is to describe a class to which the statute will be applied. That understanding of "now" furthers the purposes of the IRA, and it is consistent with

Congressional intent to benefit persons who remain "Indians" under federal jurisdiction. Moreover, Congress knows how to say "at the time of the passage of this Act" and, indeed, did so in other provisions of the IRA. At the very least, the meaning of "now" in Section 19 is ambiguous. That ambiguity, as well as Congress's use of the expansive phrase "shall include" to define the term "Indian," leaves a gap for the agency to fill.

The Secretary has reasonably done so, in regulations promulgated after notice-and-comment rulemaking. Those regulations interpret Section 5's trust-acquisition authority to extend to any Indian tribe that is recognized as eligible for Indian programs, with no limitation based on the tribe's status in 1934. Those regulations are consistent with regulations implementing the Secretary's authority under other provisions of the IRA and other Indian statutes. Moreover, that interpretation is confirmed by subsequent Indian legislation, in which Congress has confirmed the Secretary's authority to recognize tribes that were not recognized in the past, and has demonstrated its understanding and intent that all federally recognized tribes are to be treated equally with respect to Indian programs and services.

2. Nothing in the text of the Rhode Island Indian Claims Settlement Act repeals the Secretary's authority under the IRA to acquire land into trust for the Narragansett Tribe or subjects such trust lands to state jurisdiction. The only language even touching on the Secretary's trust authority suggests that the authority remains intact. The Act expressly contemplates that the Secretary might subsequently recognize the Tribe, and the parties' settlement expressly acknowledged the Tribe's right to seek recognition for eligibility for Indian programs. Moreover, the only provision conferring

state jurisdiction over lands held by or for the Tribe is expressly limited to the lands provided to the Indians in the settlement. Nothing in the Act addresses the allocation of jurisdiction over lands that the Tribe might subsequently acquire. That silence is in stark contrast to other settlement acts, in which Congress has expressly resolved trust-acquisition and jurisdictional issues with respect to land outside the settlement lands. Petitioners seek to read such language into the Rhode Island act, but it is simply not there.

ARGUMENT

I. THE SECRETARY HAS AUTHORITY UNDER SECTION 5 OF THE INDIAN REORGANIZATION ACT TO TAKE LAND INTO TRUST FOR THE NARRAGANSETT TRIBE

The first question presented is whether the Narragansett Tribe is a tribe for which the Secretary may acquire lands in trust under the IRA, without regard to whether it was recognized and under federal jurisdiction on June 18, 1934, the date of the IRA's enactment. As explained below, Congress has not unambiguously resolved that question. The Secretary, however, has answered that precise question through notice-and-comment rulemaking: his trust-acquisition authority extends to any Indian tribe that is recognized by the Secretary as eligible for Indian programs, with no limitation based on the tribe's status in 1934. 25 C.F.R. 151.2(b) and (c)(1). The court of appeals correctly concluded that the agency's interpretation is "based on a permissible construction of the statute," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), and therefore controls.

A. The Text, Structure, Purpose, And Legislative History Demonstrate That The IRA Applies To A Tribe That Is Federally Recognized As Of The Statute's Application

1. The Secretary has authority to take land into trust for a currently recognized "tribe"

Section 5 of the IRA authorizes the Secretary to take title to land "in trust for the Indian tribe or individual Indian for which the land is acquired," for "the purpose of providing land for Indians." 25 U.S.C. 465. As the court of appeals recognized (Pet. App. 23), the IRA "define[s] separately" the terms "tribe" and "Indian," and the definition of "tribe" is more expansive than that of "Indian." Section 19 broadly defines "tribe" to include all of the various political entities generally understood to be tribes—Indian tribes, organized bands, and pueblos—as well as Indians residing on one reservation. 25 U.S.C. 479. The "now under Federal jurisdiction" language—upon which petitioners' theory depends—appears only in the definition of "Indian," not in the separate statutory definition of "tribe."

To be sure, as petitioner Carcieri emphasizes (Br. 17), Section 5 states that the Secretary is authorized to take land into trust to "provid[e] land for Indians." 25 U.S.C. 465. But that phrase does not unambiguously import the plural of the term "Indian" as defined in section 19. The plural term "Indians" ordinarily connotes tribes as well as individual Indians. See, *e.g.*, *New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867) (State's attempt to tax Indian reservation land was "an unwarrantable interference, inconsistent with the original title of the Indians"); *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (referring to "Indians' exemption from state tax," expressly including both tribes and

individuals). Indeed, the IRA unambiguously uses "Indians" in that way in Section 1 by referring to "treat[ies] * * * with the Indians," 25 U.S.C. 461, which necessarily means tribes. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 3. And that reading of "Indians" makes particular sense in Section 5, which expressly provides that land can be taken "in trust for the Indian tribe or individual Indian." 25 U.S.C. 465.

Nor does anything in the IRA's text compel grafting the definition of "Indian" onto the definition of "tribe" in Section 19, and petitioners do not appear to contend otherwise. Congress did use the word "Indian" in its definition of the word "tribe," but, at least with respect to the groups described by "Indian tribe, organized band, [or] pueblo," it used only the adjective "Indian," not the noun. 25 U.S.C. 479. Given that Congress also used the adjective "Indian" in the definition of the word "Indian" itself—plainly using the adjective in a generic, non-technical sense, see *ibid.* (defining "Indian" using the undefined terms "Indian descent," "Indian reservation," and "Indian blood")—it would be implausible to conclude that using the adjective "Indian" to define "tribe" incorporates that term as technically defined in Section 19. Indeed, Congress also used the phrase "Indian tribe" in its definition of "Indian." *Ibid.* Congress's use of the phrase "Indian tribe" as part of its definition of "Indian," combined with its use of the phrase "Indian tribe" as part of its definition of "tribe," is "completely circular." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992). At a minimum, it demonstrates (contrary to petitioners' premise) that the IRA does not always use the word "Indian" in the technical sense defined in Section 19.

Thus, whatever the proper construction of "Indian," the separate definition of "tribe" in Section 19 extends the IRA's benefits to "any Indian tribe," regardless of when it received federal recognition. Giving full effect in that manner to the categorical definition of "tribe" as used in Section 5 and elsewhere in the IRA is consistent with the IRA's "overriding purpose" of revitalizing tribes as political and economic entities. *Mancari*, 417 U.S. at 542. At the very least, Section 19 does not *foreclose* that interpretation of "tribe," which is embodied in the Secretary's regulations. As explained below, any such ambiguity also extends to the phrase "recognized Indian tribe now under federal jurisdiction" in the definition of "Indian." And the definition of "Indian" itself is written in terms of the persons that word "include[s]," thereby allowing for inclusion of other comparably situated persons. 25 U.S.C. 479. Congress thus granted "authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

2. The definition of "Indian" also looks to current status

Petitioners ignore the categorical definition of "tribe" and instead rest their argument on the word "now" in the first example in the definition of "Indian": "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 479. That definition, however, does not foreclose the Secretary's trust acquisition for the Tribe.

a. When used in a statute, "now" can mean either at the time of a statute's enactment or at the time of its application. As explained in the edition of *Black's Law Dictionary* contemporaneous with passage of the IRA,

although "now" as used in a statute "ordinarily refers to the date of its taking effect," it can also refer "to a time contemporaneous with something done." *Black's Law Dictionary* 1262 (3d ed. 1933). Even petitioner Carcieri acknowledges (Br. 27) that "now" sometimes has that latter connotation. Indeed, in some contexts, the law interprets "now" in that latter sense. See 80 Am. Jur. 2d *Wills* § 1033, at 245 (2002) (courts have construed wills transferring property "now" owned as transferring "property acquired by the testator after he executes his will").

Petitioner Carcieri relies (Br. 18-19) on common dictionary definitions of "now," which include "[a]t the present time," "at the time of speaking," and "in or under the present circumstances." *Webster's New International Dictionary of the English Language* 1414 (1917). But in a statute intended to have ongoing future application, those definitions beg the relevant question: did Congress mean under the circumstances present at the time of its own action, or under the circumstances present when the statute is invoked? Considered in isolation, "now" could mean either, so the dictionary definitions do not unambiguously resolve the matter. Moreover, because there are hundreds of instances of "now" in the United States Code, the Court should decline to create any sort of artificial presumption, or inflexible rule, which could skew the interpretation of a large number of statutory provisions not before the Court.

b. The immediate context of "now" in Section 19 of the IRA, while not conclusive, suggests that Congress meant at the time of the statute's application. Section 19 includes three examples of classes of persons "include[d]" within the term "Indian." 25 U.S.C. 479. In stark contrast to the use of the fluid term "now" in the

first example, Congress used a specific date to delimit the persons included within the very next example. That example includes "all persons who are descendants of such members who were, *on June 1, 1934*, residing within the present boundaries of any Indian reservation." 25 U.S.C. 479 (emphasis added). That date is just days away from the IRA's effective date of June 18, 1934. If Congress had similarly intended the first example to refer to members of a closed class of tribes based on their status in 1934, it could simply have used a specific date, or at least expressly referred to "at the time of passage of this Act."

Indeed, elsewhere in the IRA, Congress did expressly refer to the enactment date. In Section 14, Congress used the phrase "at the time of the passage of this Act" to refer to lands then available for allotment to the Sioux Indians. 48 Stat. 987; see 25 U.S.C. 474 (replacing phrase with "on June 18, 1934"). Similarly, in Section 18, Congress required the Secretary to call special elections "within one year after the passage and approval of this Act" for Indians to exclude their reservation from the IRA's coverage. 48 Stat. 988; 25 U.S.C. 478 (replacing phrase with "within one year after June 18, 1934") (subsequently extended by a year, 49 Stat. 378). The fact that Congress did not do the same in its first description of who shall be included as an "Indian"—especially when juxtaposed against its use of a specific date in the very next example—suggests that Congress did not intend for "now" in Section 19 to mean at the time of

enactment.[2] At the very least, the text, in context, does not unambiguously require that interpretation.

c. The function the word "now" serves in the IRA further suggests that Congress intended to refer to the time of the statute's invocation. See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning against "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them") (citation omitted). Congress has sometimes used "now" to incorporate a body of legal rights or remedies, and it can be ambiguous as to whether Congress means to incorporate subsequent changes. See, *e.g.*, Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717 (offender shall "receive the same punishment as the laws of the State in which such place is situated now provide"); see *Franklin* v. *United States*, 216 U.S. 559, 568 (1910) (interpreting same); 47 U.S.C. 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute.").

Other times, as in Section 19, Congress has used "now" for the purpose of defining a class affected by the

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[2] Petitioner Carcieri asserts that it would have been "grammatically awkward for Congress to have used the term 'now' instead of the date 'June 18, 1934'" in Section 18. Br. 29 n.10. But Congress did not use the calendar date in Section 18 as enacted, 48 Stat. 988, and in any event, it could have said "within one year from now." Nor does the fact that Congress provided only a year from passage of the Act for a tribe to opt out of the IRA's coverage make it "improbable" that "now" in Section 19 means at the time of application of the Act. Carcieri Br. 29 n.10; see Charlestown Br. 25. Only those tribes that were *already* recognized and under federal jurisdiction needed to be given the option to opt out; groups that were not yet recognized effectively opt in by seeking federal recognition.

statute. While that use of "now" can refer to the time of enactment, see, *e.g.*, *Montana* v. *Kennedy*, 366 U.S. 308 (1961), it can also refer to the time of the statute's application. For example, Congress has directed that Social Security benefits be terminated when there has been improvement in the recipient's medical condition and he "is now able to engage in substantial gainful activity." Social Security Disability Reform Act of 1984, 42 U.S.C. 423(f)(1)(B)(ii). Congress plainly referred to the applicant's condition at the time of the termination decision, not the provision's enactment in 1984. See *Difford* v. *Secretary of HHS*, 910 F.2d 1316, 1320 (6th Cir. 1990). Similarly, when Congress instructed the Environmental Education Advisory Council to periodically evaluate educational organizations "now in existence," it did not mean for the Council to evaluate organizations that existed at the time of passage but later became defunct and to ignore organizations of recent origin. 20 U.S.C. 5508(d)(1)(E). And when a 1917 Act authorized the President to convey from time to time to the people of Puerto Rico "property now owned by the United States," 48 U.S.C. 748, it neither allowed the President to convey property owned by the United States in 1917 but since sold to others, nor prohibited conveyances of property acquired after 1917.

Indeed, shortly before Congress enacted the IRA, this Court read "now" in a 1906 Indian statute to refer to a time other than the date of enactment. See *United States* v. *Reily*, 290 U.S. 33 (1933). The Court held that the statute, which allowed Indians who were affiliating with Kickapoo Indians "now or hereafter nonresident in the United States" to inherit property free from alienation restrictions, did not apply to someone who met that description at some point after 1906 but no longer

did so at the time he inherited the property. *Id.* at 40. Like that statute, Section 19 appears to take into account (as Congress was presumed to be aware when it passed the IRA) that the status of a tribe or Indian may vary over time, and to provide that the current state of affairs should determine eligibility for benefits.

d. Petitioners note (Carcieri Br. 21-22) that Congress used "now" elsewhere in the IRA to refer to 1934. See 25 U.S.C. 465 (§ 5) ("now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927)"); 25 U.S.C. 468 (§ 8) ("now existing or established hereafter"); 25 U.S.C. 472 (Supp. V 2005) (§ 12) ("now or hereafter"). But the meaning of the stand-alone "now" in Section 19 cannot be extrapolated from those very different phrases. To make that leap, petitioners rely on a presumption that "now" must be given the same meaning throughout the IRA. Carcieri Br. 21-22, 28. But that "presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Cline*, 540 U.S. at 595 (citation omitted). "Now" is just "that kind of word." *Id.* at 596. "Now" is not a substantive term in the Act, and it is used in statutes to serve different purposes. Indeed, there is much less reason for a rigidly uniform meaning of "now" in the IRA than of the word "age" in a statute specifically addressing age discrimination, yet the Court declined to apply the presumption even in *Cline*.

Moreover, contrary to petitioners' contention, the fact that Congress did not add "or hereafter" to Section 19 does not "unambiguously restrict" the meaning of "Indian" to members of "tribes that were both federally recognized and under federal jurisdiction at the time

that the IRA was enacted." Carcieri Br. 22-23. To the contrary, adding "or hereafter" would have given the first example of "Indian" a meaning that is not attributed to it by either petitioners or the Secretary. The definition would then include members of federally recognized tribes under federal jurisdiction in 1934 *or* at any time since. In contrast, the Secretary's reading excludes members of tribes that may once have met that description, but no longer do. Petitioners are thus incorrect to suggest (Carcieri Br. 19-20) that the Secretary's interpretation renders "now" in Section 19—and "hereafter" in other sections, R.I. Br. 26-27—superfluous. Moreover, as explained above, "now" also serves to contrast the fluid nature of Section 19's first example of "Indian" with the closed, 1934-specific nature of the class in the second.

e. Indeed, as the court of appeals observed, "it may well be that the phrase 'now under federal jurisdiction' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" Pet. App. 25. Although reading "now" to modify the last antecedent (Carcieri Br. 33-34) might ordinarily be "sensible as a matter of grammar," that result "is not compelled" when another reading is reasonable. *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-331 (1993). Had Congress intended the word "now" to modify "recognized tribe" in the definition of "Indian," it would have made more grammatical sense to use the phrase "tribe now recognized." As the court of appeals suggested, the statute is therefore more reasonably read to limit the definition of "Indian" to those *members* of recognized tribes who personally remained under federal jurisdiction.

Congress could reasonably have so limited the IRA's benefits to individuals. Individual Indians may leave

federal jurisdiction when they abandon their tribal relations, see, *e.g.*, *In re Heff*, 197 U.S. 488, 508 (1905), overruled on other grounds, *United States* v. *Nice*, 241 U.S. 591 (1916), and tribes whose members have done so may become extinct. *Cohen* 272-273; *Miami Nation of Indians of Indiana, Inc.* v. *United States Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001), cert. denied, 534 U.S. 1129 (2002). In fact, as the court of appeals concluded (Pet. App. 23-27), the legislative history suggests that the phrase "now under federal jurisdiction" was added to Section 19 for precisely that reason: to prevent the application of the IRA to individual Indians whose relations with the United States might cease through assimilation. See pp. 23-24, *infra*.

3. The purposes and legislative history of the IRA reinforce the conclusion that Congress intended to extend its benefits to all federally-recognized tribes

a. The purposes of the IRA also suggest that Congress intended an understanding of "tribe" and "Indian" that focuses on the time the IRA is applied. As this Court has observed, the IRA was "sweeping" legislation, *Mancari*, 417 U.S. at 542, designed to serve as a new foundational charter for the Nation's Indian policy. Such a law should be "construed liberally in favor of the Indians," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citation omitted), in order to accomplish its purposes in light of unfolding developments, see *United States* v. *Lara*, 541 U.S. 193, 202-203 (2004)—not narrowly and technically in the manner petitioners propose.

The IRA's "overriding purpose" was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politi-

cally and economically." *Mancari*, 417 U.S. at 542. And the Act was comprehensive in scope. It "contains a number of provisions that have nothing to do with land consolidation," Pet. App. 21; see pp. 2-3, *supra*, designed to reinvigorate tribal relations, enhance the authority of tribal governments, restore the national policy of dealing with the Indians as tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe*, 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11,125 (1934) (statement of Sen. Wheeler)). While Section 5's trust-acquisition authority served in part to restore land lost to Indians as a result of the Allotment Act (Carcieri Br. 30-32), Section 5's scope was broader, in service of the overriding objectives of tribal self-government and self-determination and promotion of the Indians' welfare. Section 5, along with other land-related provisions, sought to assure that tribes—including those that never lost land under the Allotment Act—would have an adequate territorial base.

As the court of appeals concluded, given those broader objectives, "it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934." Pet. App. 21. Certainly nothing in the text unambiguously requires that result. Indeed, contrary to petitioners' suggestion (Carcieri Br. 5, 17) that the IRA's definition of "Indian" is unambiguously limited to Indians subject to the General Allotment Act of 1887, the IRA explicitly applies to pueblos, 25 U.S.C. 479, which were unaffected by the Allotment Act, see, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 245 n.17, 253 n.28 (1985).

b. As petitioners note (Carcieri Br. 33), the first definitional example in Section 19 was discussed during a congressional hearing in a colloquy between one of the Act's sponsors, Senator Wheeler, and Commissioner of Indian Affairs Collier. Senator Wheeler expressed the need for language that would, at some point in the future, exclude from the definition of "Indian" some of the persons who fell within the definition in 1934. Specifically, he observed: "I think you have to sooner or later eliminate those Indians who are at the present time—as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called 'tribes' there. They are no more Indians than you or I, perhaps. * * * And yet they are under the supervision of the Government of the United States." *Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 266 (1934) (*Senate Hearing*). In response, Commissioner Collier suggested adding the phrase "now under Federal jurisdiction" in the first definitional example, immediately following "recognized Indian tribe." *Ibid.* ("Would this not meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.").

Although the import of that colloquy is not entirely clear, the phrase "now under federal jurisdiction" would have to mean something other than at the time of enactment in order to address Senator Wheeler's expressed concern—namely, "to sooner or later eliminate those Indians who are at the present time * * * under the supervision of the Government of the United States." *Senate Hearing* 266. As the court of appeals observed,

"[i]f the purpose was to exclude those who might later be dropped from federal jurisdiction, it would make more sense to measure status as of the date benefits were sought, not as of the date of enactment of the statute." Pet. App. 25. Yet petitioners' interpretation would do the reverse: it would extend the benefits of the IRA to members of tribes that were recognized and under federal jurisdiction in 1934, regardless of their tribe's current status.

Petitioners emphasize (Carcieri Br. 33) Commissioner Collier's comment that the addition "would limit the act to the Indians now under Federal jurisdiction." *Senate Hearing* 266. But that restatement of the proposed language does not make the meaning of the text any more clear than the text itself. And, needless to say, ambiguous legislative history, much less an ambiguous colloquy at a single hearing, cannot make ambiguous text plain.

4. This Court's decision in John *does not require a different result*

Petitioner Charlestown is also wrong to suggest (Br. 25-28) that the meaning of "now" in Section 19 is controlled by *United States* v. *John*, 437 U.S. 634 (1978). The Court there described the definition of "Indian" in the IRA as including "not only * * * 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' * * * but also * * * 'all other persons of one-half or more Indian blood.'" *Id.* at 650 (brackets in original) (quoting 25 U.S.C. 479). Charlestown's argument hinges solely on the Court's insertion of "[in 1934]" in its quotation of the statute.

As the court of appeals noted, however, the Court's passing editorial emendation "contains no analysis on this point" and, more importantly, was entirely unnecessary to its holding. Pet. App. 22-23. Recounting a series of congressional and Executive actions, the Court rejected the Fifth Circuit's conclusion that the federal government was precluded from holding lands in trust for the Mississippi Choctaws. *John*, 437 U.S. at 649-650. When it reached the point of "[a]ssuming for the moment that authority for the [relevant] proclamation can be found only in the [IRA]," the Court addressed whether the Mississippi Choctaws were "persons of one-half or more Indian blood," 25 U.S.C. 479, and, finding that they were, held that "the Mississippi Choctaws were not to be excepted from the general operation of the [IRA]." *John*, 437 U.S. at 650. *John* lacks any analysis of what "now" means because its meaning was irrelevant to the Court's decision.

Indeed, if anything, the fact that the Court added the bracketed reference to 1934 reinforces the conclusion that the relevant clause is ambiguous; otherwise, inserting words into the statute would have been unnecessary. Moreover, in the same discussion, the Court indicated its view that the IRA covers tribes not legally recognized at the time of the IRA. See *John*, 437 U.S. at 651 n.20 (concluding, after reviewing a 1936 Interior Solicitor's opinion, that, "although there was no legal entity known as 'the Choctaw tribe of Mississippi,' the Department of the Interior anticipated that a more formal legal entity, a tribe for the purposes of federal Indian law, soon would exist"); see also *id.* at 645-646.

In any event, regardless of what the Court meant by the insertion of "[in 1934]" in *John*'s quotation of Section 19, that glancing reference was not a "hold[ing] that its

construction follows from the unambiguous terms of the statute." *Brand X*, 545 U.S. at 982. Accordingly, it does not "foreclose [the] agency from interpreting [the] ambiguous statute" in a different way. *Ibid.*[3]

5. In any event, Congress made the statutory definition of "Indian" expressly inclusive, leaving a gap for the agency to fill

Even if "now" in the first definitional example in Section 19 could be construed in context to unambiguously mean "on June 18, 1934," Congress nevertheless "explicitly left a gap for the agency to fill." *Chevron*, 467 U.S. at 843. Section 19 does not purport to delineate the entire universe of persons who are "Indians" for purposes of the IRA. Instead, Section 19 provides that "[t]he term 'Indian' as used in this Act *shall include*," and then sets forth three examples. 25 U.S.C. 479 (§ 19) (emphasis added). As this Court has frequently observed, the use of the term "include" indicates that what follows is illustrative rather than exclusive. *Burgess* v. *United States*, 128 S. Ct. 1572, 1578 n.3 (2008) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation.") (quoting 2A Singer & Singer, *Statutes and Statutory Construction* § 47:7, at 305 (7th ed.

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[3] Petitioners rely on two appellate decisions involving Section 19. Carcieri Br. 26-27. The first, however, was superseded by *John* and, in any event, cannot survive under *Brand X* because it predated the Secretary's Part 151 regulations. See *United States* v. *State Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974). The second case, *Kahawaiolaa* v. *Norton*, 386 F.3d 1271 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005), raised a constitutional issue concerning Native Hawaiians, and simply summarily stated, after quoting Section 19 and without further textual analysis of the IRA, that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Id.* at 1280.

2007)); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978).

That was the understanding in 1934, and Congress enacted Section 19 with presumed awareness of that background understanding. See, *e.g.*, *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979). Just the year before enactment of the IRA, this Court interpreted the words "shall include," in context, as a phrase of "extension or enlargement rather than as one of limitation or enumeration." *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). The Court contrasted Congress's use of "shall include" language with its use of "shall mean" language elsewhere in the statute, concluding that only the latter meant "shall include only." *Ibid.* That same reasoning applies here, with the same result. In contrast to the inclusive definition of "Indian," Congress defined "tribe" with a more definitive "shall be construed to refer to." 25 U.S.C. 479.

B. Because The Act Does Not Unambiguously Answer The Question, The Secretary's Reasonable Interpretation Of "Tribe" And "Indian" Is Controlling

At a minimum, the IRA—and its "now under Federal jurisdiction" language—does not unambiguously answer the question presented. The Secretary has promulgated regulations implementing Section 5 of the IRA that expressly cover trust acquisitions such as the one for the Narragansett Tribe. Because those regulations are based on a reasonable construction of the IRA, they are entitled to "controlling weight." *Chevron*, 467 U.S. at 844. Indeed, none of the petitioners makes any argument in this Court that, if Section 19 is ambiguous, the Secretary's interpretation is unreasonable.

1. The Secretary's construction of "tribe" and "Indian" is reasonable in light of the IRA's text, structure, purpose, and history

Congress has expressly authorized the Executive Branch to "prescribe such regulations as [it] may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. 9; see 25 U.S.C. 1, 2. In 1980, after engaging in notice-and-comment rulemaking, 45 Fed. Reg. 62,034 (1980), the Secretary adopted regulations in 25 C.F.R. Pt. 151 that govern trust acquisitions under Section 5. Those regulations define "Tribe" to mean, *inter alia*, "any Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). They further define "Individual Indian" to mean, *inter alia*, "[a]ny person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). Neither definition is tied to recognition status in 1934. Because Congress "left a gap for the agency to fill," and because "there is an express delegation of authority" to issue regulations of this kind, the Secretary's regulations are entitled to *Chevron* deference. *Chevron*, 467 U.S. at 843-844; see *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001).[4]

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[4] In an internal memorandum to the Assistant Secretary of Indian Affairs (Oct. 1, 1980), regarding a request to take land into trust for the Stillaguamish Tribe, an Associate Solicitor opined that "the definitions of 'Indian' and 'tribe' must be read together," and that Section 19's phrase "recognized tribe now under Federal jurisdiction" "includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934 whether or not that obligation was acknowledged at that time." *Id.* at 2. The Associate Solicitor concluded that the Stillaguamish was a tribe "under federal jurisdiction" in 1934 by virtue of its signing of an 1855 fishing-rights treaty. *Id.* at 6-8. See also Letter from Acting Secretary of the Interior

The regulations interpreting the Secretary's Section 5 authority do not distinguish between tribes based on their status when the IRA was enacted. Rather, as the court of appeals observed, eligibility turns on "a tribe's federal recognition status at the time a trust acquisition is requested." Pet. App. 31.[5] A tribe's recognition status, in turn, is a question that Congress has assigned to the Secretary in the Federally Recognized Indian Tribe List Act of 1994 (List Act). Pursuant to statutory directive, the Secretary publishes annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1. If a tribe is so recognized, it falls within the essentially identical definition of "Tribe"

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to David Getches 8 (Oct. 27, 1976) (denying initial request to take land into trust for Stillaguamish Tribe as a matter of discretion, and expressing "doubts" as to whether the Secretary's trust-acquisition authority extends to "tribes that were not administratively recognized on the date of [the IRA], (June 18, 1934)"). The suggestion that Section 19 requires that a tribe have been under federal jurisdiction in 1934 is flatly inconsistent with the trust-acquisition regulations in Part 151. The 1980 memorandum does not refer to those regulations, despite the fact that they had been published in final form two weeks before. It is those regulations, not the internal memorandum, that state binding agency policy. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742-743 (1996).

[5] That also is clear from the history of the regulations. As initially proposed in 1978, "Tribe" would have been defined as "any Indian tribe * * * which is currently recognized by the U.S. Government as eligible" for special Indian programs. 43 Fed. Reg. at 32,132. The final regulations deleted the word "currently" because it created ambiguity: some commentators had incorrectly read it to mean (as petitioners read "now" in IRA Section 19) "at the time of the regulations." 45 Fed. Reg. at 62,034.

in the Secretary's trust-acquisition regulations. 25 C.F.R. 151.2(b).

For all of the reasons explained in Part I.A., *supra*, the Secretary's interpretation of "tribe" and "Indian" for purposes of his trust-acquisition authority is consistent with the text, structure, purpose, and history of the IRA. And for "Indian," that is so whether his regulation is understood as an interpretation of the ambiguous phrase "recognized Indian tribe now under Federal jurisdiction" or as an explication expressly permitted by the gap left by the phrase "shall include."

2. The Secretary's regulatory interpretation is consistent with the Department's prior construction of the IRA, as well as other Indian statutes

The Secretary's prior constructions of the IRA and other Indian statutes support the reasonableness of the Secretary's construction of his trust-acquisition authority in 25 C.F.R. Pt. 151.

a. As the court of appeals observed (Pet. App. 31-32), other IRA regulations similarly define "Indian" based on circumstances at the time of application. For example, the regulations implementing the Secretary's authority under Section 16, which allows eligible Indian tribes to organize and adopt constitutions and by-laws, defines "Indian" as including "[a]ll persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 CFR 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the [IRA], as amended." 25 C.F.R. 81.1(i). An early version of the regulations implementing Section 16 defined "Indian" in similar terms that did not turn on a tribe's status as of June 18, 1934.

See 25 C.F.R. 52.1 (1966). See also 25 C.F.R. 163.1 (similar definition for Indian forestry units).

Another notable example is the employment-preference regulations under Section 12 of the IRA. In the initial version, promulgated in 1978, the Secretary defined "Indian" to mean, *inter alia*, "[m]embers of any recognized Indian tribe now under Federal Jurisdiction." 25 C.F.R. 259.1 (1978). That tracked the first example in Section 19. But by doing so *in 1978*, it reflected the Secretary's interpretation of the statutory language as referring to the time of application of the statute, not 1934. The current version continues to use that same language, including the word "now." 25 C.F.R. 5.1. Compare 42 C.F.R. 136.41 (similar definition for preference in Indian Health Service) with 42 C.F.R. 36.41 (1978) (same).

Those regulations are consistent with other regulations issued by the Secretary over the past 70 years defining "Indian" in various settings as turning on the status of a person's tribe at the time that status is being considered. In so doing, the Secretary has used the very "now" phrase that appears in Section 19 over many different years, without tying the "now" to any specific date. For example, in Law and Order Regulations issued in 1935 relating to Courts of Indian Offenses, 55 Interior Dec. 401, the Secretary defined "Indian" as "any person of Indian descent who is a member of any recognized Indian tribe *now under Federal jurisdiction*." § 1, *id.* at 401 (emphasis added). That same "now" language appeared in law-and-order regulations published in subsequent years. See, *e.g.*, 25 C.F.R. 161.2 (1938); 25 C.F.R. 161.2 (1949); 25 C.F.R. 11.2(c) (1966); see also 25 C.F.R. 11.100(d) ("Indian" defined as "a member of an Indian tribe which is recognized by the Federal Government as eligible for services from the [Bureau of Indian Af-

fairs]"). The Secretary also used that same phrase to define "Indian beneficiaries" under regulations related to health activities. See, *e.g.*, 25 C.F.R. 84.8 (1938) ("[a]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction").

b. As the court of appeals further observed (Pet. App. 35 n.10), published opinions issued by the Solicitor of the Interior interpreting the IRA also support the Secretary's regulatory definitions. For example, in 1937, the Solicitor determined whether the landless Shoshone Indians of Nevada were "Indians" within the meaning of the IRA for whom the Secretary could take land into trust under Section 5. See Op. Solic. Dep't of the Interior 706, 706 (1937) (*Solicitor's Opinions*). The Solicitor described the IRA's definition of Indian as "includ[ing] all persons of Indian descent who are members of a recognized Indian tribe now under Federal jurisdiction." *Id.* at 707 (quoting 25 U.S.C. 479). The Solicitor did not say that "now" meant the date of the IRA's enactment.[6]

Other published opinions, spanning a number of years, reflect a similar interpretation. See, *e.g.*, *Solicitor's Opinions* 668, 668 (1936) (determining that the Secretary cannot take land into trust in the name of the Choctaw Tribe of Mississippi because "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe"); *Solicitor's Opinions* 724, 727 (1937) (determining that the St. Croix Chippewa Indians were not eligible to organize under the IRA in part because, although they might once have been "recognized" as a separate band, "they now present no characteristics entitling them to recognition as a band"); *Solicitor's Opin-*

[6] In contrast, with respect to the second example in the IRA's definition, the Solicitor did note the "June 1, 1934" qualification. *Solicitor's Opinions* at 707.

ions 747, 748 (1937) (looking to the "most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups" in determining that the Nahma and Beaver Island Indians were not "recognized bands" within those groups); *Solicitor's Opinions* 1394, 1394 (1946) (determining that the evidence was insufficient to conclude whether the Burns Paiute Indian Community "constitute[d] a recognized band of Paiute Indians"). Nothing in those opinions suggests that whether the tribe was recognized and under federal jurisdiction as of the enactment of the IRA was determinative.

Moreover, the Solicitor's opinions demonstrate Interior's understanding that whether a group was a "tribe" within the meaning of Section 19 did not turn on whether the individuals in that group fell within one of the three examples in Section 19's definition of "Indian." Rather, that question turned on factors related to the entity as a group, such as whether it had treaty relations with the United States, been denominated a tribe by an Act of Congress or Executive Order, been treated as having collective rights in tribal lands or funds, had been treated as a tribe or band by other Indian tribes, or had exercised political authority over its members. See *Cohen* 270-271; see also, *e.g.*, *Solicitor's Opinions* 1261 (1944) (Catawba Tribe); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 502-503 (1986).

c. Regulatory practice also supports the Secretary's interpretation. As the court of appeals observed, "it is not seriously disputed that the Secretary has never *rejected* an application to take land into trust for a federally recognized tribe on the ground that the tribe was not recognized and under federal jurisdiction in 1934." Pet. App. 32. Moreover, the Secretary has taken land into

trust for tribes that were federally recognized after 1934. For example, the Secretary has acquired trust lands for the Sault Ste. Marie Tribe of Ottawa and Chippewa Indians of Michigan and the Grand Traverse Band of Chippewa Indians. See Resp. C.A. Supp. En Banc Br. App. A. Like the Narragansett, those groups were acknowledged as tribes pursuant to the administrative process established by the Part 83 regulations (*id.* at App. E at 15-16). And the Secretary has acquired trust land for the Tunica-Biloxi Indian Tribe of Louisiana, recognized in 1981. *Id.* at 16.

Similarly, pursuant to his authority in Section 16 of the IRA, the Secretary has organized tribes that were federally recognized after the statute's enactment. For example, Interior Department records show that, in addition to taking land into trust, the Secretary approved a constitution for the Sault Ste. Marie Tribe in 1975. Likewise, in 1962, the Secretary approved a constitution for the Miccosukee Tribe of Indians of Florida, which was not recognized until 1961 (Resp. C.A. Supp. En Banc Br. App. E at 15).

d. There is an internal Interior Department circular distributed in 1936 that states a view of the first example in Section 19's definition contrary to the interpretation at pp. 14-21, *supra*. That circular, issued over Commissioner Collier's signature and addressed to "Superintendents," stated that Section 19 "provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act; (2) descendants of such members residing on an Indian reservation June 1, 1934; and (3) all other persons of one-half or more Indian blood." United States Dep't of Interior, *Circular No. 3134, Enrollment*

Under The IRA (*1936 Circular*) 1 (March 7, 1936); *ibid.* (describing as "Class 1" a person of Indian descent who "belongs to a recognized tribe which was under Federal jurisdiction on the date of the Act"). The circular expressed the view that persons falling within the first class "will be carried on the rolls as members of the tribe," but that a record needed to be kept of those falling within the second and third classes. *Ibid.* The circular thus included instructions for registering persons falling within the second and third examples. *Ibid.*

That internal memorandum, which was furnished to this Office by the Department of the Interior after this Court granted certiorari in this case following a further search of the Department's records, does not outweigh, much less vitiate, the interpretations and agency practice discussed above. Moreover, even standing alone, that internal memorandum cannot defeat the reasonableness of the Secretary's current interpretation of his trust-acquisition authority for several reasons. That document expressly noted that the definition of "Indian" in the IRA "shall include" the three specified examples, *1936 Circular* 1, a formulation that allows the Secretary to classify additional persons as "Indians." See pp. 26-27, *supra*. Its description of the first example was also unnecessary to the purpose of the circular, which was to provide internal guidance for keeping a record of persons that fell within the second and third examples. See *id.* at 1-2.[7]

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[7] The fact that the memorandum appears above the signature of Commissioner Collier, who suggested the phrase "now under Federal jurisdiction" during a colloquy in the legislative hearings (see pp. 23-24, *supra*), does not make the statutory language plain. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history, *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980),

Most importantly, that internal memorandum cannot defeat the deference due the Secretary's interpretation promulgated through a formal rulemaking process. *Brand X*, 545 U.S. at 981-982.[8]

3. Subsequent Indian legislation, including amendments to the IRA itself, demonstrates the reasonableness of the Secretary's interpretation

In the 74 years since passage of the IRA, Congress has enacted many statutes addressing Indian tribes and their status under federal law. Although Congress is presumed to be aware of the Secretary's trust-acquisition regulations, Congress has never amended the provisions at issue or otherwise expressed concern that the Secretary has misinterpreted his authority. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). Moreover, taken together, and considering the "overall statutory scheme," see, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007), Congress's enactments since passage of the IRA reinforce the reasonableness of the Secretary's in-

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and Commissioner Collier was not even a legislator who voted on the IRA.

[8] In addition, in a 1994 letter responding to a request from a Member of Congress for a list of so-called nonhistoric Indian tribes, the Acting Assistant Secretary for Indian Affairs set forth a description of Section 19 of the IRA similar to the one used by this Court in *John*. Letter from Acting Assistant Secretary—Indian Affairs to Rep. George Miler 3 (Jan. 14, 1994). That description, however, does not reflect a considered agency judgment of that particular question and, for the same reason, underscores the ambiguity inherent in the statutory language. In any event, that statement is incorrect, and was flatly inconsistent at the time with longstanding regulations promulgated after notice and comment, including the regulations in Part 81, to which the letter refers generally in the immediately preceding paragraph. See 25 C.F.R. 81.1.

terpretation of his trust-acquisition authority. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

a. In 1994, Congress amended the IRA to add two new subsections, both of which expressly articulate a principle of equality among recognized tribes. 25 U.S.C. 476(f) and (g). Subsection (f) prohibits federal agencies from promulgating "any regulation or mak[ing] any decision or determination pursuant to the [IRA] or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. 476(f). Subsection (g) provides that any such regulation or decision "shall have no force or effect." 25 U.S.C. 476(g). Those subsections expressly mandate a principle of administrative equality and non-discrimination that extends to *all* federally recognized tribes, without regard to whether they were "under Federal jurisdiction" on June 18, 1934. As one cosponsor of the amendment explained, the "amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law." See 140 Cong. Rec. 11,235 (1994) (statement of Sen. McCain).

b. The reasonableness of the Secretary's interpretation is further bolstered by the List Act, also enacted in 1994. The List Act mandates that the Secretary publish "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. 479a-1.

The legislative findings in the List Act expressly contemplate the addition of tribes that had not previously been recognized. They note the Secretary's authority to recognize tribes pursuant to "the administrative procedures set forth in part 83 of the Code of Federal Regulations," 25 U.S.C. 479a note, as well as his responsibility to "regularly update[]" that list. *Ibid.* The findings also expressly state that Congress "has actively sought to restore recognition to tribes that previously have been terminated." *Ibid.*; 25 U.S.C. 479a-1(b) (requiring annual publication of list).

The List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when that tribe attained federal recognition. And the eligibility-for-benefits language of the List Act is substantially similar to the regulatory definition of "Tribe" adopted by the Secretary to implement his trust-acquisition authority under Section 5 of the IRA. See 25 C.F.R. 151.2(b) ("[a]ny Indian tribe * * * which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"). It therefore is appropriate to presume that Congress understood that, once a tribe was recognized, it would be eligible for trust acquisitions under Section 5 of the IRA.[9]

c. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, enacted in 1988, also embodies a statutory confirmation that the Secretary's Section 5 authority extends to newly-recognized Indian tribes. Although IGRA generally bans gaming on lands acquired by the Secretary after October 17, 1988, it carves out several

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[9] While Congress has sometimes expressly made the IRA applicable to particular newly-recognized and restored tribes, see Carcieri Br. 23 n.6 (citing 25 U.S.C. 1300b-14(a), 1300i-8(a)(2)), that simply serves to eliminate any doubt on the question.

exceptions. 25 U.S.C. 2719. As relevant here, IGRA allows gaming (under certain circumstances) on lands taken into trust after October 17, 1988, as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. 2719(b)(1)(B)(ii). That exception presupposes that the Secretary has authority to take land into trust for the benefit of tribes that he has first recognized after 1934. The fact that Congress legislated on that premise supports the reasonableness of the Secretary's conclusion that he has that authority. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 770 (1996).

d. Congress also has enacted special statutes extending certain benefits of the IRA—namely Section 5's trust-acquisition authority, see 25 U.S.C. 2202, as well as the IRA's restrictions on alienation (§ 2) and its incorporation provision (§ 17), see 25 U.S.C. 478-1—to "all tribes," "[n]otwithstanding section 18 of the [IRA]." *Ibid.*; 25 U.S.C. 2202. The principal purpose of those provisions, as their text makes clear, is to extend those IRA benefits even to tribes that voted under Section 18 to opt out of the IRA. It would be incongruous to give those tribes a second chance to benefit from those IRA provisions if Congress believed that those provisions did not apply to newly-recognized tribes.

Indeed, as the government adverted to and amici thoroughly briefed below, Section 2202 extends the IRA's trust-acquisition authority to "all tribes," regardless of whether they opted out of the IRA or their date of federal recognition. Resp. C.A. Supp. En Banc Br. 12; NCAI C.A. Opening Br. 16-17; NCAI C.A. En Banc Br. 15. The court of appeals did not address that issue, however, and the government did not present it in response to the petition in this Court. If this Court were to reject

the Secretary's interpretation of Section 19, a remand to decide that alternative ground would be appropriate.

II. THE RHODE ISLAND INDIAN CLAIMS SETTLEMENT ACT NEITHER REPEALS THE SECRETARY'S TRUST AUTHORITY UNDER IRA SECTION 5 NOR SUBJECTS NEW TRUST LAND TO STATE JURISDICTION

The court of appeals correctly concluded that the Settlement Act neither repeals the Secretary's authority under the IRA to acquire land in trust for the Narragansett Tribe nor subjects any new trust land to state jurisdiction. The Settlement Act resolved then-pending lawsuits in which the Narragansett sought to void title to 3200 acres of land in Rhode Island, contending that the Tribe possessed aboriginal title to the lands and that the lands had been transferred without federal approval, in violation of the Non-Intercourse Act, 25 U.S.C. 177. See pp. 6-7, *supra*. Congress determined that settlement legislation was necessary because the claims had caused "severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town." 25 U.S.C. 1701(b).

The Settlement Act resolved that property dispute, and it closely tracked the settlement agreement (J.A. 25a-38a) between the litigating parties. The Act granted the Tribe 1800 acres of land, 25 U.S.C. 1706, 1707, denominated as the Settlement Lands. See 25 U.S.C. 1702(d), (e), and (f). In exchange, the Act cleared the titles of any other lands claimed by the Narragansett Tribe in the United States, or lands claimed by other Indians in Rhode Island (outside Charlestown), by retroactively deeming lawful all transfers of land from them. 25 U.S.C. 1705(a)(1) and 1712(a)(1). The Act further provided that that retroactive approval "shall be regarded

as an extinguishment" of any "aboriginal title" that the Indians may have held to such lands, 25 U.S.C. 1705(a)(2) and 1712(a)(2), and of "all claims" that they may have "arising subsequent to" the retroactively-approved transfers and "based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy)." 25 U.S.C. 1705(a)(3) and 1712(a)(3).

A. The Text, Structure, Purpose, And History Of The Settlement Act Demonstrate That It Did Not Repeal Or Limit The Secretary's Trust-Acquisition Authority

1. The presumption is that when Congress intends to repeal existing statutory authority, it does so expressly. See *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Mancari*, 417 U.S. at 549-550. As the court of appeals concluded, however, "[t]here is simply nothing in the text of the Settlement Act * * * that accomplishes * * * a repeal or curtailment of the Secretary's trust authority." Pet. App. 37. Indeed, "[n]o language * * * even references[] the Secretary's power under the IRA to take lands into trust." *Id.* at 38. And the only language that even bears on that authority suggests that the Secretary's trust authority is preserved.

The Settlement Act expressly contemplates that the Secretary might "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," 25 U.S.C. 1707(c), which was not federally recognized when the Settlement Act was passed. Indeed, the terms of settlement agreement expressly provided that the Tribe would "have the same right to petition for recognition and services as other groups." J.A. 29a.

Congress was presumably aware that, if the Secretary did take land into trust for the Narragansett, that

land could be "Indian country," over which the United States and the Tribe would have jurisdiction. 18 U.S.C. 1151; see, *e.g.*, *Citizen Band Potawatomi Tribe*, 498 U.S. at 511 (citing, *inter alia*, *John*, 437 U.S. at 648-649). Nothing in the Settlement Act purports to prevent the operation of that established jurisdictional rule if the Secretary were to take land into trust. The only provisions of the Settlement Act that speak to jurisdiction expressly apply only to the 1800 acres of Settlement Lands. Section 9, which is entitled, in part, "Applicability of State Law," provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. 1708(a); see 25 U.S.C. 1702(d), (e), and (f) (defining "settlement lands"); 25 U.S.C. 1706(a)(3) (addressing fishing and hunting on settlement lands). The court of appeals correctly rejected petitioners' attempt to read that provision as applying "to all lands the Tribe might ever acquire, either directly or as the beneficiary of a trust," because "that is not what the section says." Pet. App. 38.

If Congress had intended the meaning sought by petitioners, it could have said so. As the court of appeals observed, "[i]t would have been easy to extend the provisions of section 1708(a) preserving state sovereignty to cover all lands in Rhode Island owned by or held in trust for the Tribe." Pet. App. 47. Or the Settlement Act could have placed restrictions on the Secretary's trust authority in 25 U.S.C. 1707(c), where Congress contemplated that the Secretary might subsequently recognize the Tribe and placed restrictions on conveyance of the Settlement Lands if he did. Or, as both the court of appeals and the IBIA noted, "paragraph 15 of the [settlement agreement] would have been 'a logical place for the parties to set out any restrictions' on the Secretary's

trust authority following federal recognition of the Tribe." Pet. App. 47 (quoting J.A. 62a). But not only does the settlement agreement not contain such restrictions, it expressly contemplates that, if recognized, the Tribe would be eligible for the same federal benefits as other tribes. J.A. 29a.

2. Contrary to petitioners' contention (Carcieri Br. 40), the text and structure of the Settlement Act make clear that the extinguishment provisions settle only claims based on past land transactions, and do not speak to any future land acquisitions.

The Tribe purchased the land at issue here in fee simple from a private developer, more than a decade after the Settlement Act. Pet. App. 12. The Tribe's new title thus obviously was not based on any claim extinguished by the Settlement Act. Nothing in the Act prohibits the Tribe from purchasing land on the open market, and petitioners do not contend otherwise. See Carcieri Br. 40. Nor does the Tribe seek to assert sovereignty over the parcel based on any prior aboriginal title or any claim extinguished by the Settlement Act.

Rather, the Tribe simply pursued the "proper avenue" for tribes "to reestablish sovereign authority over territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005). In *City of Sherrill*, the Court described Section 5 of the IRA as the "mechanism" that Congress provided "for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." *Id.* at 220. The Court observed that the Secretary's regulations implementing Section 5 "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory," including "[j]urisdictional problems and potential conflicts of

land use which may arise." *Id.* at 220-221 (quoting 25 C.F.R. 151.10(f)).

The fact that the Tribe once had sovereignty over the parcel here by virtue of aboriginal title, which has been extinguished by the Settlement Act, does not foreclose the Secretary from taking the land into trust, with the usual jurisdictional consequences. To be sure, the extinguishment of the Tribe's aboriginal title would preclude it from claiming that its fee purchase *unilaterally* reestablished sovereignty. See *City of Sherrill*, 544 U.S. at 202-203. But, as the court of appeals concluded, "[h]owever aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty." Pet. App. 42. Indeed, nothing in Section 5 attaches any significance to the presence or absence of prior tribal sovereignty over the land. See 25 U.S.C. 465 (authorizing trust acquisitions "within or without existing reservations"), 467 (allowing Secretary to proclaim new reservations on acquired land).

The State relies on the Settlement Act's extinguishment of "all claims . . . arising subsequent to the transfer and based upon any interest in or right involving such land," and contends that the "extinguishment of future land-acquisition claims necessarily extends to seeking Secretarial action under 25 U.S.C. § 465." R.I. Br. 40-41 (emphasis omitted) (quoting 25 U.S.C. 1705(a)(3), 1712(a)(3)). As an initial matter, the claims to which the quoted text refers are not any claims arising subsequent to the Settlement Act, but claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers. 25 U.S.C. 1705(a)(1) and (3); 25 U.S.C. 1712(a)(1) and (3); see H.R. Rep. No. 1453, 95th Cong., 2d Sess. 12 (1978) ("Such approval of these prior conveyances will also clear * * * title back

to the transfers being approved."). In any event, neither the Secretary nor the Tribe is asserting any "claim" at all. Rather, the Secretary has exercised authority expressly conferred by the IRA, and the Tribe has been accorded a benefit available to all recognized Indian tribes at the Secretary's discretion. The Act's extinguishment provisions therefore have no application here.

3. That conclusion is confirmed by the purpose and history of the Settlement Act. As reflected in the legislative findings, 25 U.S.C. 1701, and in the congressional reports, the purpose of the Act was "to implement a settlement agreement" among the Tribe, the State, and private landowners "concerning the Tribe's claim to certain lands within the town of Charlestown and for damages for trespass on such lands." S. Rep. No. 972, 95th Cong., 2d Sess. 5 (1978). The committee reports reflect an intent to "eliminat[e] any cloud on the title to claimed lands while assuring that the Tribe is adequately compensated for extinguishment of its claims to the lands." *Ibid.*; accord H.R. Rep. No. 1453, *supra*, at 5. Thus, while the Settlement Act does reflect an intent "to resolve once and for all the claims being asserted" by the Tribe "on the ground that past transfers of those lands may have been made in violation of the Indian Nonintercourse Act," *id.* at 15 (quoting letter from Interior Solicitor Krulitz), it was not designed to be a comprehensive resolution of all the issues that might arise if the Secretary recognized the Tribe in the future.

B. A Comparison To Other Settlement Acts Makes Clear That The Rhode Island Act Does Not Impose The Restrictions Petitioners Assert

1. In stark contrast to the provisions at issue here, Congress has demonstrated in other settlement acts that it knows how to preclude the future exercise of authority under IRA Section 5 and to impose special jurisdictional rules when it wants to do so.

As the court of appeals observed (Pet. App. 47-48), the Maine Indian Claims Settlement Act, 25 U.S.C. 1721 *et seq.*, which Congress passed only two years after the Rhode Island statute, contained just such explicit language. That act stated: "Except for the provisions of this [Act], the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. 1724(e) (Supp. V 2005). It further specified the boundaries within which the United States could acquire land in trust and provided that land "acquired outside the boundaries * * * shall be held in fee by the respective tribe or nation." 25 U.S.C. 1724(d).

Also unlike the Settlement Act here, the Maine statute included language expressly addressing the allocation of criminal, civil, and regulatory jurisdiction throughout the State, not just on settlement lands. In particular, it provided generally that any lands owned by, or held in trust by the United States for, any Indians other than the Passamaquoddy Tribe or Penobscot Nation "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State." 25 U.S.C. 1725(a). The Maine act further provided that the land owned by, or held in trust for, the Passamaquoddy Tribe

and the Penobscot Nation would be "subject to the jurisdiction of the State of Maine to the extent and in the manner provided by" a state statute, 25 U.S.C. 1725(b)(1), and authorized those tribes "to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine to the extent authorized" by state law. 25 U.S.C. 1725(f). See 25 U.S.C. 1725(e)(1) (granting consent to amend state statute's allocation of jurisdiction with tribe's consent).

Similarly, the Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. 1751 *et seq.*, included an express (albeit less sweeping) limitation on the Secretary's trust authority outside the boundaries of settlement lands in Connecticut. That statute expressly provided that lands acquired using the statutory settlement fund and "located within the settlement lands shall be held in trust by the United States," 25 U.S.C. 1754(b)(7), but that lands acquired with that fund "located outside of the settlement lands shall be held in fee" by the tribe, and that "the United States shall have no further trust responsibility with respect to such land." 25 U.S.C. 1754(b)(8). That provision precludes the Secretary from taking into trust land outside the settlement lands that are purchased using the settlement fund. See *Connecticut ex rel. Blumenthal* v. *United States Dep't of the Interior*, 228 F.3d 82, 88 (2d Cir. 2000), cert. denied, 532 U.S. 1007 (2001).

Also, unlike here, Congress elsewhere has made clear that state jurisdiction applies to lands subsequently acquired by or held in trust for the tribe. In the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, 25 U.S.C. 1771 *et seq.*, Congress expressly provided that "the settlement lands *and any other land that may now or hereafter be owned by or*

held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts." 25 U.S.C. 1771g (emphasis added). Petitioners attempt to read such language into the Settlement Act here, but the Act contains no such text.[10]

Significantly, the Maine, Connecticut, and Massachusetts settlement acts all contain extinguishment provisions—similar to the ones on which petitioners rely here—that extinguish the Indians' aboriginal title to previously transferred land and "all claims" they may have had "arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy." 25 U.S.C. 1723(b) and (c) (Maine); see 25 U.S.C. 1753(b) and (c) (Connecticut; similar); 25 U.S.C. 1771b(b) and (c) (Massachusetts; similar). Given the express provisions in those acts separately addressing the Secretary's future trust authority and jurisdictional alloca-

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[10] In the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773 *et seq.*, Congress also expressly addressed both future trust acquisitions and jurisdiction over those lands. That statute provides that "the Secretary shall exercise the authority provided him in section 465 of this title, and shall apply the standards set forth in [25 C.F.R. Pt. 151]" to any such acquisitions. 25 U.S.C. 1773c. It further provides that "[t]he Tribe shall retain and exercise jurisdiction, and the United States and the State and political subdivisions thereof shall retain and exercise jurisdiction, as provided in the Settlement Agreement and Technical Documents and, where not provided therein, as otherwise provided by Federal law." 25 U.S.C. 1773g. That statute confirms that the Secretary's trust-acquisition authority was already "provided [to] him in section 465," and demonstrates that when Congress intends to adopt special jurisdictional rules, it does so expressly.

tions over subsequently-acquired lands, Congress plainly did not understand the provisions extinguishing property claims to have the effect suggested by petitioners.

2. Contrary to petitioners' contention (Carcieri Br. 45-47), nothing in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, suggests that the very different provisions of the Rhode Island Act foreclose the Secretary from exercising his authority under IRA Section 5. Although the House Report states that the Settlement Act "follows the precedent set in [ANSCA] by providing the Indians with an opportunity to acquire a viable land base in the process of resolving their claims to aboriginal lands," H.R. Rep. No. 1453, *supra*, at 8, the statutes diverge in significant respects relevant here.

As the court of appeals observed (Pet. App. 45 n.15), ANCSA virtually eliminated all reservations in Alaska and transferred both funds and land, without restraints on alienation, to business corporations wholly owned by Alaska Natives that were to be formed pursuant to ANCSA. See, *e.g.*, 43 U.S.C. 1601, 1605, 1606, 1607, 1618; 43 U.S.C. 1613, 1617 (2000 & Supp. V. 2005); *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-534 (1998). In contrast, the Rhode Island act *created* a land base for the then-landless Narragansett. Although the Narragansett had been organized as a state-chartered corporation known as the "Narragansett Tribe of Indians," 25 U.S.C. 1702(a), the Settlement Act placed the management of their land for the time being in the hands of a separate corporation with a board having both tribal and state representatives. 25 U.S.C. 1706. And, in sharp contrast to ANCSA, the Settlement Act explicitly contemplated that the Settlement Lands could be conveyed to the Tribe "if the Secretary subse-

quently acknowledged" it, and would then be subject to a federal restraint on alienation. 25 U.S.C. 1707(c). Thus, unlike ANCSA, the Settlement Act facilitated the return to, rather than the elimination of, federal superintendence of the Tribe's lands.

Moreover, although congressional staff members apparently proposed claims-extinguishment provisions here that were modeled on ANSCA, and which would have provided for extinguishment as of the Settlement Act's enactment date, H.R. Rep. No. 1453, *supra*, at 9, nothing about the use of those provisions as a model suggests that the Settlement Act would have had the sweeping effect petitioners assert. Indeed, the staff proposal was subsequently modified after Interior urged that the statute "provide for both extinguishment and ratification as of the time that the original transfers occurred." *Id.* at 15 (citation omitted). Interior sought to ensure that the statute would "not form the basis for a claim of a taking as of the date of enactment," *ibid.*, and, based on litigation involving ANSCA, to ensure that it would "eliminate any possible trespass or related claims." *Id.* at 16. Those concerns demonstrate that the provisions were addressed solely to extinguishing property claims based on prior invalid transfers, not to limiting the Secretary's distinct authority under the IRA or addressing the jurisdictional consequences of the Secretary's exercise of that authority on behalf of a recognized tribe.

Petitioner Carcieri's argument also rests (Br. 45) on the erroneous premise that ANCSA prohibited trust acquisitions in Alaska. The 1993 Solicitor's Opinion petitioner cites in support of that argument refers to an Associate Solicitor's opinion from 1978 that stated that it would be an abuse of discretion to take land into trust for Native Villages in Alaska in light of the distinctive fea-

tures of ANCSA. That 1978 opinion (which has been rescinded, 66 Fed. Reg. 3452, 3454 (2001)) did not conclude that the terms of ANCSA prohibited trust acquisition. To date, the Secretary has chosen in his discretion not to exercise such authority. See 25 C.F.R. 151.1 (explaining that regulations do not cover trust acquisition in Alaska). His decision not to do so is currently being challenged. *Akiachak Native Cmty.* v. *United States Dep't of Interior*, No. 1:06-cv-00969 (D.D.C. filed May 24, 2006). In any event, that distinct statutory issue is irrelevant here: petitioners have not renewed their claims in this Court that the Secretary abused his discretion in deciding to take this land into trust.

3. At bottom, petitioners argue that the Settlement Act impliedly repealed the Secretary's Section 5 trust authority. But, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *TVA*, 437 U.S. at 190 (citation omitted). The Secretary's trust authority in the IRA can readily co-exist with the Settlement Act, and both should therefore be given effect. See *Connecticut*, 228 F.3d at 90 (concluding the same concerning Connecticut settlement act).

C. Any Doubt Should Be Resolved In Favor Of Preserving The Secretary's Trust Authority

Although the Settlement Act does not contain any ambiguity suggesting that the IRA has been rendered inapplicable, if the Court concludes otherwise, it should give due deference to the agency's interpretation of the Settlement Act, as reflected in the IBIA's well-reasoned decision (J.A. 55a-62a). See *Mead*, 533 U.S. at 229-231. Furthermore, if there is any doubt, the statute should

"be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima*, 502 U.S. at 269 (citation omitted). This Court has consistently cautioned against concluding, in the face of silence, that a congressional enactment divests privileges attendant to tribal status. See, *e.g.*, *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987). "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978).

Those principles should apply with particular force here. In 1996, Congress added a new subsection to the Settlement Act's section governing state jurisdiction, to provide that the Settlement Lands should not be treated as "Indian lands" for purposes of the IGRA. 25 U.S.C. 1708(b). By that time, the Secretary had taken the Settlement Lands into trust over the Town's objection, see *Town of Charlestown*, 18 I.B.I.A. 67 (1989), and the Tribe had applied to have the parcel at issue here taken into trust. Despite the explicit provisions in the intervening Maine, Connecticut, and Massachusetts acts addressing the Secretary's trust authority, Congress did not otherwise amend the Act.

The court of appeals' reading does not vitiate the bargain struck by the parties. The State and the private landowners obtained the relief they sought: the clearing of clouds on title to 3200 acres of land. See 25 U.S.C. 1701. The State also retained civil and criminal jurisdiction over the land provided to the Tribe in return for the Tribe's accession to the validity of those titles. But, unlike other States, Rhode Island did not secure any provision repealing the Secretary's ability to take land into

trust for the Tribe or subjecting any such land to state jurisdiction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DEANNE E. MAYNARD
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys

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STATUTORY APPENDIX

1. The Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, provides:

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project

heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the

loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of

equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the

expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian

Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of theAct of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person

shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the Unite States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the Powers conferred incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

2. 25 U.S.C. 2 provides:

Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

3. 25 U.S.C. 9 provides:

Regulations by President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

4. 25 U.S.C. 465 provides:

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one

fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

5. 25 U.S.C. 472 (Supp. V 2005) provides:

Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

6. 25 U.S.C. 476 (2000 & Supp. V 2005) provides:

Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this

section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

7. 25 U.S.C. 477 provides:

Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own,

hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

8. 25 U.S.C. 478 provides:

Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

9. 25 U.S.C. 478-1 provides:

Mandatory application of sections 462 and 477

Notwithstanding section 478 of this title, sections 462 and 477 of this title shall apply to—

(1) all Indian tribes,

(2) all lands held in trust by the United States for Indians, and

(3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

10. 25 U.S.C. 479 provides:

Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

11. 25 U.S.C. 479a provides:

Definitions

For the purposes of this title:[1]

(1) The term "Secretary"means the Secretary of the Interior.

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[1] [This title, referred to in introductory provisions, is Pub. L. 103-455, Title I, § 101 *et seq.*, Nov. 2, 1994, 108 Stat. 4791, which enacted this section, section 479a0-1 of this title]

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

12. 25 U.S.C. 479a-1 provides:

Publication of list of recognized tribes

(a) Publication of list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

13. 25 U.S.C. 1701 provides:

Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

14. 25 U.S.C. 1702 provides:

Definitions

For the purposes of this subchapter, the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006

(D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

15. 25 U.S.C. 1703 provides:

Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

16. 25 U.S.C. 1704 provides

Option agreements to purchase private settlement lands

(a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided*, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its sub-

mission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Amount of payment

Payment for any option entered into pursuant to subsection (a) of this section shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

(c) Limitation on option fees

The total amount of the option fees paid pursuant to subsection (b) of this section shall not exceed $175,000.

(d) Application of option fee

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) Retention of option payment

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

17. 25 U.S.C. 1705 provides:

Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which

the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one

hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

18. 25 U.S.C. 1706 provides:

Findings by Secretary

Section 1705 of this title shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

19. 25 U.S.C. 1707 provides:

Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corpo-

ration or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

20. 25 U.S.C. 1708 provides:

Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act

(a) In general

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(b) Treatment of settlement lands under Indian Gaming Regulatory Act

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

21. 25 U.S.C. 1709 provides:

Preservation of Federal benefits

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669-669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777-777(k)).

22. 25 U.S.C. 1710 provides:

Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

23. 25 U.S.C. 1711 provides:

Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

24. 25 U.S.C. 1712 provides:

Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b) of this section—

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

25. 25 U.S.C. 1715 provides:

Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

26. 25 U.S.C. 1716 provides:

Deferral of capital gains

For purposes of title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of title 26.

27. 25 U.S.C. 2201 (2000 & Supp. V 2005) provides:

Definitions

For the purpose of this chapter—

(1) "Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2) "Indian" means—

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian

tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.[1]

* * * * *

(4) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.[1]

28. 25 U.S.C. 2202 provides:

Other applicable provisions

The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law

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[1] So in original. The period probably should be a semicolon.

which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

29. 25 U.S.C. 2719 provides:

Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres

of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is

in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

30. 25 C.F.R. Pt. 5 provides in pertinent part:

Preference in Employment

§ 5.1 Definitions.

For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; and

(e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

* * * * *

31. 25 C.F.R. Pt. 81 provides, in pertinent part:

Tribal Reorganization Under A Federal Statute

§ 81.1 Definintions.

As used in this part:

* * * * *

(i) *Indian* means: (1) All persons who are members of those tribes listed or eligible to be listed in the FEDERAL REGISTER pursuant to 25 CFR 83.6(b) as recognized by and receiving services from the Bureau of Indian Affairs; provided, that the tribes have not voted to exclude themselves from the Act of June 18, 1934, 43 Stat. 984, as amended; and (2) any person not a member of one of the listed or eligible to be listed tribes who possesses at least one-half degree of Indian blood.

* * * * *

(w) *Tribe* means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the FEDERAL REGISTER pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs; and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. Such tribes may consist of any consolidation of one or more tribes or parts of tribes.

* * * * *

32. 25 C.F.R. Pt. 83 provides, in pertinent part:

Procedures for Establishing that an American Indian group exists as an Indian Tribe

* * * * *

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

§ 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the

Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7(a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

* * * * *

§ 83.12 Implementation of decisions.

(a) Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

(b) Upon acknowledgment as an Indian tribe, the list of members submitted as part of the petitioners documented petition shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes. For Bureau purposes, any additions made to the roll, other than individuals who are descendants of

those on the roll and who meet the tribe's membership criteria, shall be limited to those meeting the requirements of § 83.7(e) and maintaining significant social and political ties with the tribe (i.e., maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition).

(c) While the newly acknowledged tribe shall be considered eligible for benefits and services available to federally recognized tribes because of their status as Indian tribes, acknowledgment of tribal existence shall not create immediate access to existing programs. The tribe may participate in existing programs after it meets the specific program requirements, if any, and upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly acknowledged tribe.

(d) Within six months after acknowledgment, the appropriate Area Office shall consult with the newly acknowledged tribe and develop, in cooperation with the tribe, a determination of needs and a recommended budget. These shall be forwarded to the Assistant Secretary. The recommended budget will then be considered along with other recommendations by the Assistant Secretary in the usual budget request process.

33. 25 C.F.R. Pt. 151 provides in pertinent part:

Land Acquistions

§ 151.1 Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and

tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members.

§ 151.2 Definitions.

(a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land or land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *Restricted land or land in restricted status* means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

§ 151.3 Land acquistion policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

§ 151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

* * * * *

§ 151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

§ 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

§ 151.12 Action on requests.

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of

that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

34. 25 C.F.R. Pt. 163 provides in pertinent part:

General Forestry Regulations

§ 163.1 Definitions.

* * * * *

Indian means a member of an Indian tribe.

* * * * *

Indian forest land means Indian land, including commercial, non-commercial, productive and non-productive timberland and woodland, that are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover, regardless of whether a formal inspection and land classification action has been taken.

* * * * *

Indian tribe or *tribe* means any Indian tribe, band, nation, rancheria, Pueblo or other organized group or

community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and shall mean, where appropriate, the recognized tribal government of such tribe's reservation.

* * * * *

35. 42 C.F.R. 136.41 provides:

Definitions.

For purposes of making appointments to vacancies in all positions in the Indian Health Service, a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; or

(e) Until January 4, 1990, or until the Osage Tribe has formally organized, whichever comes first, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

REPLY BRIEF

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IN THE
Supreme Court of the United States

DONALD L. CARCIERI,
Governor of Rhode Island, ET AL.,
Petitioners,

v.

DIRK KEMPTHORNE,
Secretary of the Interior, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY BRIEF FOR PETITIONER DONALD L. CARCIERI

CLAIRE RICHARDS
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Donald L. Carcieri

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER DONALD L. CARCIERI 1

I. THE IRA UNAMBIGUOUSLY RESTRICTS THE SECRETARY'S TRUST AUTHORITY TO TRIBES THAT WERE FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934 2

A. The Plain Language Of The IRA Forecloses The Secretary's Expansive Interpretation Of His Trust Authority 3

B. The Policies Animating The IRA Confirm That The Secretary Has Exceeded The Scope Of His Trust Authority 14

II. THE SETTLEMENT ACT PROHIBITS TRUST ACQUISITIONS IN THE STATE OF RHODE ISLAND 16

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001) 14

BankAmerica Corp. v. United States,
462 U.S. 122 (1983) 6, 20

Brown v. Gardner,
513 U.S. 115 (1994) 6

De Lima v. Bidwell,
182 U.S. 1 (1901) 12

Franklin v. United States,
216 U.S. 559 (1910) 3

Hibbs v. Winn,
542 U.S. 88 (2004) 8, 12

Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) 12

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 4

Montana v. Kennedy,
366 U.S. 308 (1961) 3

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 12

United States v. Estill,
62 F.2d 620 (10th Cir. 1932) 11

United States v. John,
437 U.S. 634 (1978) 4, 15

United States v. Mitchell,
463 U.S. 206 (1983) 5

United States v. Monsanto,
491 U.S. 600 (1989) 9

United States v. Reily,
290 U.S. 33 (1933) 11

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 8

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 7

STATUTES

16 U.S.C. § 824a-3(j)(2) 5

20 U.S.C. § 1099e(c)(2) 5

25 U.S.C. § 461 14

25 U.S.C. § 465 ..... 3, 4, 7, 8, 10, 14

25 U.S.C. § 468 ..... 4, 10

25 U.S.C. § 472 ..... 4, 10

25 U.S.C. § 475a 4

25 U.S.C. § 476(f) 12

25 U.S.C. § 478 13

25 U.S.C. § 479 ..... 1, 2, 3, 15

25 U.S.C. § 479a-1 13

25 U.S.C. § 484 4

25 U.S.C. § 1300b-14(a) 14, 16

25 U.S.C. § 1300i-8(a)(2) 14, 16

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25 U.S.C. § 1705(a)(3) 16, 18

25 U.S.C. § 1724(d) 18

25 U.S.C. § 1754(b)(7) 19

25 U.S.C. § 1771d(d) 19

25 U.S.C. § 2202 13

25 U.S.C. § 2719(b)(1)(B)(ii) 14

43 U.S.C. § 1601(b) 21

REGULATIONS

25 C.F.R. § 1.4 18

25 C.F.R. § 151.2(b) 9

OTHER AUTHORITIES

The American Indian and the United States (Wilcomb E. Washburn ed., 1973) 14

To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong. (1934) 5

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Webster's New International Dictionary of the English Language (2d ed. 1939) 3

REPLY BRIEF FOR PETITIONER DONALD L. CARCIERI

The Secretary's defense of his decision to take the disputed 31-acre parcel into trust on behalf of the Tribe pays little heed to the sovereign interests of the State of Rhode Island. Indeed, the Secretary's authority to take land into trust—and to divest state and local authorities of jurisdiction over that land—unquestionably imposes a substantial burden on state sovereign interests. Because land held in trust for a tribe is largely exempt from the State's criminal and civil jurisdiction, the State generally lacks the authority to regulate criminal conduct, health-and-safety standards, commercial transactions, and environmental conditions on such land—even though the land is situated within the State's territorial boundaries, may border heavily populated areas, and may have been subject to continuous state jurisdiction for hundreds of years.

In light of a trust acquisition's profound consequences for state sovereign interests, Congress restricted the Secretary's trust authority under the Indian Reorganization Act ("IRA") to those Indian tribes that were most urgently in need of federal assistance at the time of the IRA's enactment—*i.e.*, those tribes that had been dispossessed of their land through the federal government's allotment policy. This restriction is unambiguously embodied in the IRA's definition of "Indian," which (as relevant here) limits the statute's scope to "persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added).

The Secretary seeks to expand his trust authority beyond the IRA's statutory boundaries by taking land into trust for the Narragansetts, a tribe that was neither federally recognized nor under federal jurisdiction at the time of the IRA's enactment in 1934 and that was not subject to the federal government's allotment policy. In so doing, he also attempts to evade the limitations imposed on his trust authority by the Rhode Island Indian Claims Settlement Act ("Settlement Act"), which extinguished "all Indian [land] claims" within Rhode Island (J.A. 27a), including trust applications asserting claims to sovereign authority over land.

The Secretary's approval of the Tribe's trust application—and his arguments in defense of that decision in this Court—cannot be squared with the text, structure, or purpose of either the IRA or the Settlement Act.

I. THE IRA UNAMBIGUOUSLY RESTRICTS THE SECRETARY'S TRUST AUTHORITY TO TRIBES THAT WERE FEDERALLY RECOGNIZED AND UNDER FEDERAL JURISDICTION IN 1934.

When Congress enacted the IRA in 1934, it restricted the Secretary's trust authority to "recognized Indian tribe[s] now under Federal jurisdiction." 25 U.S.C. § 479. The Secretary's reading of "now" to mean "at any future time when the statute is applied" disregards several well-established canons of construction—not to mention, the unambiguously expressed views of Commissioner of Indian Affairs John Collier, a principal architect of the IRA and author of the disputed statutory language.

A. The Plain Language Of The IRA Forecloses The Secretary's Expansive Interpretation Of His Trust Authority.

1. The IRA limits the Secretary's trust authority to those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment by declaring that the Secretary may use that far-reaching authority *only* "for the purpose of providing land *for Indians*." 25 U.S.C. § 465 (emphasis added). In turn, Congress defined the term "Indian" (as relevant here) as "all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." *Id.* § 479 (emphasis added). This definition restricts the Secretary's trust authority to individual Indians who are members of tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934 and to tribes whose members meet those statutory criteria. The Secretary therefore may not take the disputed 31-acre parcel into trust for the Narragansett Tribe—and strip the State of jurisdiction over that land—because it is undisputed that the Tribe was not federally recognized and under federal jurisdiction in 1934. U.S. Br. 7; J.A. 22a.

Ordinary principles of statutory construction leave no room for reasonable debate on this point. Congress regularly uses the term "now" to refer to conditions "at the time" Congress was "speaking" (*Webster's New International Dictionary of the English Language* 1671 (2d ed. 1939))—*i.e.*, at the time of the statute's enactment. *See Montana v. Kennedy*, 366 U.S. 308, 312 (1961); *Franklin v. United States*, 216 U.S. 559, 569 (1910). And there is absolutely no doubt that Congress used "now" in this way in other

sections of the IRA, including in the section that affords the Secretary his trust authority. *See* 25 U.S.C. § 465 (referring to "measures *now* pending in Congress") (emphasis added); *see also id.* § 484 (later-enacted provision of the IRA referring to "water rights *now* vested in" a tribe) (emphasis added). Because "identical words used in different parts of the same statute are . . . presumed to have the same meaning" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006)) (alteration in original; internal quotation marks omitted), the statutory context unequivocally demonstrates that Congress intended the term "now" in Section 19 of the IRA to restrict the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction at the time of the statute's enactment. Indeed, the Court has read Section 19 to impose this very limitation. *See United States v. John*, 437 U.S. 634, 650 (1978) (construing Section 19 as requiring "Indian" status to be determined as of 1934).

Any conceivable doubt on this point is removed when Section 19 is juxtaposed with those sections of the IRA in which Congress referred to post-enactment developments through the use of the phrase "now *or hereafter*." *See* 25 U.S.C. § 468; *id.* § 472; *see also id.* § 475a (later-enacted provision). If Congress had intended to extend eligibility for trust acquisitions to tribes that obtained federal recognition after the IRA's enactment, it would have used this "now or hereafter" formulation in Section 19—or would have omitted a temporal qualifier altogether.[1]

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[1] To extend IRA eligibility to tribes that were federally recognized after 1934, Congress could also have expressly stated in Section 19 that the definition of "Indian" encompasses persons

The Department of the Interior circular disclosed by the Secretary after nearly a decade of litigation in this case demonstrates that this reading of the IRA was shared by Commissioner of Indian Affairs John Collier. *See* U.S. Dep't of Interior, Circular No. 3134, Enrollment Under the IRA 1 (Mar. 7, 1936) ("Section 19 of the [IRA] provides, in effect, that the term 'Indian' as used therein shall include . . . all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act."). This document is highly probative not only because it discloses the Department of the Interior's official position regarding the IRA's scope shortly after the statute's enactment but also because Commissioner Collier was "a principal author of the Act." *United States v. Mitchell*, 463 U.S. 206, 221 n.21 (1983). Indeed, Commissioner Collier proposed the addition of the term "now" to the definition of "Indian" in Section 19 in order, as he explained it, to "limit the act to the Indians now under Federal jurisdiction." *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm.*

[Footnote continued from previous page]

of Indian descent "who are members of any recognized Indian tribe under Federal jurisdiction *at the time of application* for benefits." Indeed, numerous federal statutes incorporate this "time of application" language or a similar formulation. *See* 20 U.S.C. § 1099e(c)(2) ("The term 'Asian American and Native American Pacific Islander-serving institution' means an institution of higher education that is an eligible institution under section 1058(b) of this title and *at the time of application*, has an enrollment of undergraduate students that is at least 10 percent Asian American and Native American Pacific Islander students.") (emphasis added); 16 U.S.C. § 824a-3(j)(2).

on Indian Affairs, 73d Cong. 266 (1934). Two years after the statute's enactment, Commissioner Collier, speaking on behalf of the Department, interpreted Section 19 as having accomplished precisely that result by limiting IRA eligibility to "recognized tribe[s] that [were] under Federal jurisdiction at the date of the Act." Circular No. 3134, *supra*, at 1. This "contemporaneous interpretation of [the] challenged statute by [the] agency charged with its enforcement"—and by the author of the disputed language—is entitled to "great weight." *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983).[2]

2. Confronted with the unequivocal language of the IRA, the Secretary strives to inject ambiguity where none is present. But ambiguity is not a creature of mere "definitional possibilities" and interpretive speculation (*Brown v. Gardner*, 513 U.S. 115, 118 (1994)), and each of the Secretary's attempts to suggest that Congress actually intended the term "now" to mean "later" falls well short of the mark.

The Secretary initially attempts to navigate around the "now under federal jurisdiction" limitation in the IRA's definition of "Indian" by contending

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[2] Other Department of the Interior documents that the Secretary lodged with this Court demonstrate that the Department explicitly endorsed this reading of the IRA on several future occasions. *See* Letter from Acting Secretary of the Interior to David H. Getches 8 (Oct. 27, 1976) (refusing to take land into trust on behalf of the Stillaguamish Tribe in part because "the Solicitor has some doubts that the Department can take land in trust under 25 U.S.C. § 465 for tribes that were not administratively recognized on the date of that act") (emphasis omitted); Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs 6 (Oct. 1, 1980) ("it is clear that the definition of Indian requires that some type of obligation or extension of services to a tribe must have existed in 1934").

that the restriction is altogether irrelevant when the Secretary takes land into trust on behalf of a tribe, rather than an individual Indian. U.S. Br. 12. To make this argument, the Secretary is forced to nullify the first sentence of Section 5, which authorizes the Secretary to use his trust authority only "for the purpose of providing land *for Indians*." 25 U.S.C. § 465 (emphasis added). According to the Secretary, the term "Indians" in this clause does not incorporate the definition of "Indian" in Section 19 of the IRA and instead refers generically to an undefined class of persons, leaving the Secretary free to take land into trust for any "Indian tribe or individual Indian" under the last sentence of Section 5. U.S. Br. 12.

Taken together with the Secretary's argument that the definition of "Indian" in Section 19 is both nonexhaustive (U.S. Br. 26) and irrelevant to whether a group constitutes an "Indian tribe" (*id.* at 13), the Secretary's reading of Section 5 would effectively grant him the discretionary authority to divest a State of jurisdiction over *any* land and take that land into trust "for the purpose of providing land" for *any* individual or group. Congress's delegation to the Secretary of such unfettered discretion to abrogate state sovereignty for the benefit of any group that he deems, at his whim and fancy, to be an "Indian tribe," or any individual he deems to be an "Indian," would raise serious constitutional concerns. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("when Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform") (internal quotation marks and emphasis omitted; alteration in original). The IRA should be construed to avoid these difficult constitutional ques-

tions by giving the "purpose of providing land for Indians" clause in Section 5 its natural reading, which restricts the Secretary's trust authority to persons who meet the statutory definition of "Indian" and to tribes whose members meet that definition. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

Moreover, even if the Secretary were correct that the term "Indians" in the first sentence of Section 5 is a generic, meaningless term that does not impose any constraints on the Secretary's trust authority, he is most decidedly wrong when he suggests that the last sentence of Section 5 authorizes the Secretary to take land into trust on behalf of any tribe without regard to whether the tribe's members are "Indians" under Section 19. U.S. Br. 13. The Secretary's argument depends upon reading additional language out of Section 5—this time, the term "Indian" in the sentence providing that land acquired by the Secretary "shall be taken . . . in trust for the *Indian* tribe." 25 U.S.C. § 465 (emphasis added).

Congress presumably intended for the word "Indian" in the phrase "Indian tribe" to serve some function. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The term's only conceivable function is to incorporate the definition of "Indian" in Section 19 of the IRA—thereby limiting the Secretary's trust authority to tribes whose members satisfy that definition. *See* Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs 2 (Oct. 1, 1980) ("the definitions of 'Indian' and 'tribe' must be read together"). The scope of the Secretary's trust authority is thus ultimately the same whether the "purpose of providing land for Indians" clause in the first sentence of Section 5, or the "Indian tribe or individual Indian" clause in the last sentence of Sec-

tion 5, defines the scope of that authority. Either way, when the Secretary invokes his authority to take land into trust on behalf of a tribe, that tribe's members must be "Indians" within the meaning of the IRA.

Indeed, the Secretary himself has always recognized that, in practice, the words "Indian" and "tribe" in the last sentence of Section 5 must be read together. If land could be acquired in trust for a tribe whose members did not meet one of the three definitional criteria in Section 19—membership in a federally recognized tribe, descent from a tribal member, or blood quantum—then the Secretary could take land into trust on behalf of *any* tribe of Indians, even one that is recognized only under state law. But the Secretary has *always* required a tribe to be federally recognized—if not in 1934, then at least at the time when its trust application is submitted—for land to be taken into trust on its behalf. Indeed, the Secretary not only acknowledges this limitation in his brief (at 11), but has unambiguously embodied this restriction in his regulations governing trust acquisitions. *See* 25 C.F.R. § 151.2(b) ("*Tribe* means any Indian tribe . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.").

The Secretary further contends that, even if the statutory definition of "Indian" is relevant to the scope of his authority to take land into trust for Indian tribes, he has the authority unilaterally to expand the meaning of that term because the definition of "Indian" in Section 19 is introduced by the phrase "shall include." U.S. Br. 26. But while the word "include" may sometimes introduce a non-exhaustive list of terms, Congress also regularly uses the term to denote an exhaustive list. *See, e.g., United States*

v. Monsanto, 491 U.S. 600, 607 (1989). The function served by the term therefore depends upon the statutory context, and it strains credulity to suggest that Congress crafted a precise and carefully delineated definition of three classes of "Indians" in Section 19 of the IRA, only to authorize the Secretary to undermine that careful line-drawing by unilaterally expanding the definition of "Indian" as he sees fit. Not only is this reading of "include" inconsistent with the precision that Congress used in defining the term "Indian" for purposes of the IRA, but—as with the Secretary's reading of the "purpose of providing land for Indians" clause in Section 5—it would also generate grave constitutional concerns because Congress would have failed to impose *any* meaningful constraints on the Secretary's authority to place land under the sovereign control of an Indian tribe.

The Secretary's quibbling with petitioners' reading of the definition of "Indian" in Section 19 is also insufficient to create ambiguity regarding the meaning of the "now under federal jurisdiction" limitation. The Secretary contends, for example, that Congress would have used a specific date, or the phrase "at the time of the passage of this Act," if it had intended to limit the definition of "Indian" to members of tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment. U.S. Br. 16-17. But the Secretary's hypothesis is obliterated by the fact—undisputed by the Secretary or his *amici*—that "Congress used 'now' elsewhere in the IRA to refer to 1934" (U.S. Br. 19 (citing 25 U.S.C. § 465)) and the phrase "now or hereafter" to encompass post-enactment developments. 25 U.S.C. § 468; *id.* § 472; *see also* Nat'l Congress of Am. Indians Br. 15 (in Section 5 of the IRA, "the word 'now' surely means 'in 1934'"). Congress's use of the phrase "now

under federal jurisdiction" in Section 19—rather than "now or hereafter under federal jurisdiction"—thus unambiguously conveys Congress's intention to restrict the definition to tribes that were federally recognized and under federal jurisdiction at the time of enactment.[3]

The Secretary also attempts to save his reading of the term "now" from superfluity by arguing that its inclusion in Section 19 was necessary to "exclude[ ] members of tribes that may once have [been federally recognized and under federal jurisdiction], but no longer" are at the time they submit a trust application. U.S. Br. 20. But, if that was Congress's intention when enacting Section 19, it could have accomplished exactly the same result by simply omitting the term "now" altogether, which would have limited trust eligibility to tribes that were federally recognized and under federal jurisdiction at the time of the trust acquisition and excluded tribes that were federally recognized at the time of the IRA's enactment but thereafter lost their federal recognition.

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[3] The Secretary is incorrect when he states that this Court construed the phrase "now or hereafter" in *United States v. Reily*, 290 U.S. 33 (1933), to mean something other than "at the time of enactment and thereafter." In construing the Act of June 21, 1906, which removed the restrictions on the alienation of allotted Indian land when inherited by an heir living in a foreign country, the Court explicitly adopted the Tenth Circuit's construction of the statute, which determined whether the restriction on alienation had been removed by inquiring whether the heir resided in a foreign country "'*on the twenty-first day of June, 1906*, and thereafter,'" and inherited the land at the time he was still living in a foreign country. *Id.* at 40 (citing *United States v. Estill*, 62 F.2d 620, 621 (10th Cir. 1932)) (emphasis added). The Court concluded that, in the case before it, the restriction on alienation remained in force because the land had been inherited after the heir returned to the United States. *Id.*

See De Lima v. Bidwell, 182 U.S. 1, 197 (1901) (statutory criteria are presumptively measured at the time of a statute's application). The Secretary's reading of Section 19 is implausible because it would result in the statute meaning *exactly* the same thing without the presence of the word "now." *See Hibbs*, 542 U.S. at 101.[4]

Moreover, none of the later-enacted statutes invoked by the Secretary and his *amici* modifies Section 19's unambiguous restriction on the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction in 1934. The 1994 IRA amendment, for example, that imposes a *general* prohibition on agency action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes" (25 U.S.C. § 476(f)) does not supersede the *specific* restrictions that Congress expressly imposed on the Secretary's trust authority in Section 19 of the IRA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute

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[4] In a final attempt to manufacture ambiguity in Section 19, the Secretary suggests that the phrase "now under federal jurisdiction" in Section 19 may modify "all persons of Indian descent," rather than "recognized Indian tribe[s]." U.S. Br. 20. Prior to this case, neither the Secretary nor any court had countenanced such a reading—which is flatly inconsistent with the rule of the last antecedent. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005). In any event, even if this reading were correct, it would not benefit the Narragansetts because the Tribe's members were not "under federal jurisdiction" at the time of the IRA's enactment. *See* J.A. 22a (1937 letter from Commissioner of Indian Affairs stating that the "Narragansett Indians have never been under the jurisdiction of the Federal Government").

dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). The same is true of the List Act, which does nothing more than require the Secretary to publish an annual list of tribes eligible for the "special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Until Congress enacts a statute that specifically expands the definition of "Indian" under the IRA to reach members of *all* federally recognized tribes—rather than members of only those tribes that were federally recognized and under federal jurisdiction in 1934—the temporal restrictions that Section 19 imposes on the Secretary's trust authority remain in force.

The United States and its *amici* are wrong when they contend that the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202, is such a statute. U.S. Br. 39; Nat'l Congress of Am. Indians Br. 6. That statute merely provides that the "provisions of section 5" of the IRA "shall apply to all tribes notwithstanding the provisions of section 18" of the IRA, which is the section that excludes from the statute those tribes that voted to opt out of its application within one year of enactment. 25 U.S.C. § 478. ILCA therefore extends the Secretary's trust authority to tribes that were federally recognized and under federal jurisdiction in 1934 but that voted to opt out of the IRA's application under Section 18 of the statute. It leaves intact the requirement imposed by *Section 19* of the IRA that a tribe have been federally recognized and under federal jurisdiction in 1934 in order to benefit from the Secretary's trust authority.

The Secretary's reliance on the Indian Gaming Regulatory Act ("IGRA") is equally misplaced. The IGRA authorizes gaming on land acquired in trust

after October 17, 1988, where that land is part of "the initial reservation of an Indian tribe acknowledged by the Secretary." 25 U.S.C. § 2719(b)(1)(B)(ii). Far from expanding the Secretary's trust authority under Section 5 of the IRA, the IGRA merely recognizes the possibility that land might be taken into trust on behalf of a newly recognized tribe if Congress explicitly extends the IRA to that tribe in a statute granting federal recognition or in a separately enacted provision. *See, e.g., id.* § 1300b-14(a) (extending the IRA to the Texas Band of Kickapoo Indians); *id.* § 1300i-8(a)(2) (extending the IRA to the Yurok Tribe). In the absence of such explicit congressional action, the unambiguous language of Section 19 excludes newly recognized tribes from the scope of the Secretary's trust authority.

B. The Policies Animating The IRA Confirm That The Secretary Has Exceeded The Scope Of His Trust Authority.

The restrictions that Section 19 of the IRA explicitly imposes on the Secretary's trust authority are consistent with the IRA's objective of "repudiat[ing] the practice of allotment" (*Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001)), which left tens of thousands of Indians landless and substantially weakened the political and economic infrastructure of many tribes. The IRA prohibited further allotments of Indian lands (25 U.S.C. § 461) and established the trust mechanism to provide lands for those tribes and individual Indians who had lost their land through allotment. *Id.* § 465.

Because it was necessary that "the line . . . be drawn somewhere" in defining those Indians entitled to the IRA's benefits (3 *The American Indian and the*

United States (Wilcomb E. Washburn ed., 1973) (statement of Rep. Howard)), Congress carefully delineated three categories of Indians eligible to have land taken into trust on their behalf and to benefit from the IRA's other provisions. The first—and most frequently invoked—category comprises those Indians who are members of tribes that were federally recognized and under federal jurisdiction at the time of the statute's enactment, which are the tribes that were subject to the loss of land under the allotment policy.

The Secretary and his *amici* suggest that restricting this first definition of "Indian" to members of tribes that were federally recognized and under federal jurisdiction in 1934 would exclude a significant number of needy Indians from the IRA's benefits. But these arguments uniformly overlook the fact that the IRA creates two additional means of establishing eligibility for the statute's benefits (neither of which has been invoked by the Narragansetts or is at issue in this case). The IRA's definition of Indian extends not only to persons of Indian descent who are members of a tribe that was federally recognized and under federal jurisdiction in 1934, but also to descendants of such members who were living on a reservation on June 1, 1934, and to persons with one-half or more Indian blood. 25 U.S.C. § 479. Accordingly, those tribes that were not federally recognized and under federal jurisdiction in 1934 are not categorically excluded from the IRA, and may invoke all of the statute's benefits if their members satisfy either of the IRA's alternative definitions of "Indian." *See, e.g.*, *John*, 437 U.S. at 650 (concluding that the IRA applied to the Mississippi Choctaws, even though they were not federally recognized at the

time of its enactment, because they were "persons of one-half or more Indian blood").

Moreover, Congress has on a number of occasions enacted statutes that explicitly extended the IRA to tribes that would not otherwise have been eligible for the IRA's benefits. *See, e.g.*, 25 U.S.C. § 1300b-14(a); *id.* § 1300i-8(a)(2).

The contentions of the Secretary and his *amici* that giving effect to the plain meaning of Section 19 would greatly impair tribal interests are therefore substantially overstated and the product of an artificially narrow view of the mechanisms for establishing eligibility for the IRA's benefits. Even if that were not the case, however, these policy concerns would not provide a permissible ground for the Secretary's decision to disregard the IRA's unambiguous language restricting his trust authority to tribes that were federally recognized and under federal jurisdiction in 1934.

II. The Settlement Act Prohibits Trust Acquisitions In The State Of Rhode Island.

The Secretary's acquisition of the 31-acre parcel in trust for the Tribe is also foreclosed by the Settlement Act, which extinguished "*all* claims" by the Tribe "based upon any interest in or right involving . . . land" that the Tribe had previously transferred to other landowners, including "claims for use and occupancy" of such land. 25 U.S.C. § 1705(a)(3) (emphasis added). The Secretary and Tribe attempt to constrict the Settlement Act's broad claims-extinguishment language and obscure the settling parties' clearly expressed intention to "eliminate[] *all* Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Is-

land." J.A. 27a (emphasis added). Their efforts are unavailing.

A. Invoking the court of appeals' reasoning, the Secretary asserts that there is "'simply nothing in the text of the Settlement Act . . . that accomplishes . . . a repeal or curtailment'" of his trust authority. U.S. Br. 41 (quoting Pet. App. 37). According to the Secretary, the Settlement Act's claims-extinguishment provision does nothing more than clear the clouds on title to land claimed by the Tribe in its 1975 lawsuits against landowners in the Town of Charlestown. *Id.* at 45. But any doubts about the validity of those titles were removed by the provision of the Settlement Act "deem[ing]" all of the Tribe's transfers of land within Rhode Island "to have been made in accordance with the Constitution and all laws of the United States." 25 U.S.C. § 1705(a)(1). That express congressional approval prohibited the Tribe from bringing suit based on the purported invalidity of those transfers. The claims-extinguishment provision must therefore serve a different purpose than simply preventing the Tribe from asserting claims contesting the validity of the transactions transferring its aboriginal lands to non-tribal members. To serve some function—which it must be presumed to do—the claims-extinguishment provision must encompass tribal land claims that are not based on these centuries-old land transactions.

Indeed, contrary to the Secretary's assertion, there is nothing in the broadly worded claims-extinguishment provision that restricts its application to "claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers" (U.S. Br. 44 (emphasis in original))—and the Secretary points to no such language. The claims-extinguishment provision instead

applies to "*all* claims" by the Tribe based on "*any* interest in or right involving land" transferred by the Tribe, and explicitly encompasses claims for "use and occupancy." 25 U.S.C. § 1705(a)(3) (emphases added).

The Tribe's trust application is a "claim" to sovereign authority over property that is currently subject to the civil and criminal jurisdiction of the State of Rhode Island and Town of Charlestown. *See* Tribe Br. 16 (defining a "claim" as "'a title to anything which another should give or concede to, or confer on, the claimant'") (quoting *Webster's New International Dictionary* 493 (2d ed. 1959)). If the Secretary's approval of the application is upheld by this Court, state and local jurisdiction over the parcel will be ousted and jurisdiction over the land will be conferred on the Tribe. *See* 25 C.F.R. § 1.4. The Tribe's claim to sovereign "use and occupancy" over the 31-acre parcel falls squarely within the Settlement Act's broad claims-extinguishment language. *See* Pet. App. 74-75 (Howard, J., dissenting) ("asking to have land taken into trust by the BIA under the IRA to effect an ouster of state jurisdiction is a quintessential 'Indian' land claim").

The Secretary and Tribe make much of the fact that several other Indian claims settlement acts include language that expressly restricts the Secretary's trust authority. U.S. Br. 46; Tribe Br. 29. But the Secretary and Tribe fail to mention that, unlike the Rhode Island settlement act, each of these other acts also contains a provision that expressly *authorizes* trust acquisitions. *See, e.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1724(d) (requiring the first 150,000 acres of land acquired for the Penobscot and Passamaquoddy to be held in trust); Connecticut Indian Lands Claims Settlement Act, 25

U.S.C. § 1754(b)(7); Massachusetts Indian Claims Settlement Act, 25 U.S.C. § 1771d(d). Because Congress did not intend for the Secretary to possess unrestricted trust authority in these States, it was also necessary for Congress to include provisions in each of these acts that explicitly imposed limitations on the scope of that authority. Thus, far from supporting the Secretary's narrow reading of the Rhode Island settlement act, these statutes establish that when Congress intends to permit trust acquisitions to continue after the enactment of a settlement act with broad claims-extinguishment language, it includes explicit authorization for such acquisitions in the text of the act itself. The Rhode Island Indian Claims Settlement Act includes no such authorization.

B. The Secretary's narrow reading of the Settlement Act is also at odds with the statute's objective of "eliminat[ing] all Indian claims of any kind" involving land in Rhode Island. J.A. 42. The Secretary makes little effort to explain why the State would conceivably have agreed to the terms of the Settlement Act as construed by the Secretary. Indeed, it would have made little sense for the State to have agreed to a settlement intended to "eliminate all Indian [land] claims" in the State if that settlement left the Tribe, upon receiving federal recognition, free to request that the Secretary acquire an unlimited amount of land in trust on its behalf and divest the State of criminal and civil jurisdiction over that land. The Secretary's far-reaching trust authority is incompatible with the Settlement Act's careful compromise among the sovereign interests of the federal, state, and tribal governments.

Nor is the Secretary able to draw a meaningful distinction between the Settlement Act and the

Alaska Native Claims Settlement Act ("ANCSA"), which the Secretary has construed as foreclosing trust acquisitions in Alaska. *See* U.S. Dep't of the Interior Solicitor Op. M-36975, at 107-08, 123 n.296 (Jan. 19, 1993) ("1993 Solicitor Op."). The Secretary asserts that the two statutes are distinguishable because, unlike ANCSA, which "virtually eliminated all reservations in Alaska," "the Rhode Island act *created* a land base for the then-landless Narragansett." U.S. Br. 49 (emphasis in original). The Secretary neglects to mention, however, that there were no—and have never been any—reservations in Rhode Island for the Settlement Act to eliminate. Thus, significantly more probative than this superficial distinction is the fact that the Settlement Act established precisely the same land base for the Narragansetts—land held in fee simple by a state-chartered corporation controlled by tribal members—as ANCSA did for Alaska Natives. *See* Carcieri Br. 45-47.

The Secretary also emphasizes that the Department of the Interior has rescinded a 1978 Solicitor's Opinion that concluded that it would be an "abuse of discretion" for the Secretary to take land into trust in Alaska. U.S. Br. 51; *see also* Tribe Br. 33 (the 1978 Opinion concluded "that the intent and purpose of the ANCSA was to prohibit trust acquisitions by the Secretary"). Despite this rescission, the Secretary's near-contemporaneous construction of the ANCSA remains entitled to significant deference. *See Bank-America Corp.*, 462 U.S. at 130. In any event, the Department has not rescinded its 1993 Solicitor's Opinion construing ANCSA. That opinion concluded that "Congress has left little or no room for tribes in Alaska to exercise governmental authority over land" and that the "statutory scheme established in

ANCSA precludes the treatment of lands under that Act as Indian country." 1993 Solicitor Op., *supra*, at 108, 131. The Secretary has recently reaffirmed that conclusion in litigation challenging his refusal to take land into trust in Alaska. *See* Reply in Support of Cross-Motion for Summary Judgment at 14, Akiachak Native Cmty. v. Dep't of the Interior, No. 06-969 (filed July 25, 2008) ("the express intent of [ANCSA] was to avoid the continuation and/or creation of 'a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska'") (quoting 43 U.S.C. § 1601(b)).

Because the Settlement Act, like ANCSA, is incompatible with the Tribe's alleged right to "exercise governmental authority over land," the Secretary is barred from taking the 31-acre parcel into trust on behalf of the Tribe.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CLAIRE RICHARDS
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Donald L. Carcieri

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REPLY BRIEF

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In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTON, RHODE ISLAND,
Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER STATE OF RHODE ISLAND

PATRICK C. LYNCH
ATTORNEY GENERAL

Neil F.X. Kelly *
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284
NKelly@riag.ri.gov
Counsel for Petitioner
State of Rhode Island
* *Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

1-9-17 A 37

TABLE OF CONTENTS

Table of Authorities iii

Reply Brief for Petitioner State of Rhode Island . . 1

I. Section 5 of the Indian Reorganization Act of 1934 Does Not Apply to the Narragansett Indian Tribe. 1

A. The Secretary is authorized to take land into trust only for "Indians" as defined in Section 19 of the IRA. 3

B. The Narragansett Tribe is not a tribe "now under Federal jurisdiction" within the meaning of Section 19 of the IRA. . . 5

1. The text of the IRA unambiguously excludes the Narragansett Tribe. . . . 5

2. The background of the IRA confirms that "now" means June 18, 1934. . . 10

3. Until it adopted its trust-acquisition regulations in 1980, the Secretary routinely construed "now" to mean June 18, 1934. 12

4. Congress did not amend the definition of "Indian" in §479 in later-enacted statutes. 15

II. The Settlement Act Extinguished "All Claims" To Further Indian Occupied Trust

Land And Indian Country In Rhode Island. 19

A. The plain language of the Settlement Act extinguished the Narragansetts right to assert land claims in Rhode Island. ... 21

B. The United States' position would undermine the jurisdictional bargain struck by the parties and ratified by Congress. 26

Conclusion 29

TABLE OF AUTHORITIES

Cases

Alaska v. Native Vill. of Venetie Tribal Gov't,
522 U.S. 520 (1998) 25

Atkinson Trading Co. v. Shirley,
532 U.S. 645 (2001) 10

Bates v. United States,
522 U.S. 23 (1997) 22

Burgess v. United States,
128 S. Ct. 1572 (2008) 9

Cass Co. v. Leech Lake Band of Chippewa Indians,
524 U.S. 101 (1998) 28

City of Sherrill v. Oneida Indian Nation,
544 U.S. 197 (2005) 28

County of Yakima v. Confederated Tribes & Bands of Yakima Nation,
502 U.S. 251 (1992) 10

Duncan v. Walker,
533 U.S. 167 (2001) 8

Lane v. Pena,
518 U.S. 187 (1996) 24

Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, et al.,
78 F. Supp. 2d 699 (W.D. Mich. 1999), *remanded on other grounds*, 288 F.3d 910 (6th Cir. 2002) 18

United States v. John,
437 U.S. 634 (1978) 6, 17, 18, 24, 25

United States v. Monsanto,
491 U.S. 600 (1989) 9

United States v. State Tax Comm'n,
505 F.2d 633 (5th Cir. 1974) 25

Varity Corp. v. Howe,
516 U.S. 489 (1996) 23

Whitfield v. United States,
543 U.S. 209 (2005) 24

Statutes

18 U.S.C. §1151(a) 28

20 U.S.C. §5508(d)(1)(E) 7

25 U.S.C. §465 (§5) 3, 13

25 U.S.C. §467 (§7) 3

25 U.S.C. §468 (§8) 8

25 U.S.C. §472 (§12) 3, 8

25 U.S.C. §474 (§14) 9

25 U.S.C. §476 (§16) 4, 15

25 U.S.C. §476(f) 15, 16

25 U.S.C. §476(g) 15, 16

25 U.S.C. §478 (§18) 4, 9

25 U.S.C. §479 (§19) 3, 9, 15

25 U.S.C. §479a 17

25 U.S.C. §1300k-4(a) 18

25 U.S.C. §§1701 *et seq.* 19

25 U.S.C. §1705 27

25 U.S.C. §1705(a)(1) 21

25 U.S.C. §1705(a)(2) 21

25 U.S.C. §1705(a)(3) 20, 21, 22, 23

25 U.S.C. §1705(b)(3) 25

25 U.S.C. §1706 27

25 U.S.C. §1708 ..... 23, 27, 28

25 U.S.C. §1712 27

25 U.S.C. §§1721 *et seq.* 23, 24

25 U.S.C. §§1751 *et seq.* 24

25 U.S.C. §§1771 *et seq.* 24

25 U.S.C. §2202 18

25 U.S.C. §§2701 *et seq.* 17, 18

25 U.S.C. §2719(B)(1)(B)(ii) 17, 18

42 U.S.C. §423(f) 7

43 U.S.C. §1603(b) 25

43 U.S.C. §1603(c) 25

Coquille Restoration Act, Pub. L. No. 101-42 (1989) 18

Hoopa-Yurok Settlement Act, Pub. L. No. 100-580 (1988) 18

Indian Reorganization Act of 1934
§5 (25 U.S.C. §465) ..... *passim*
§7 (25 U.S.C. §467) 3
§12 (25 U.S.C. §472) 3
§16 (25 U.S.C. §476) 14, 15, 16
§18 (25 U.S.C. §478) 18
§19 (25 U.S.C. §479) ..... *passim*

Regulations

25 C.F.R. Pt. 151 5

Other Authorities

140 Cong. Rec. S 6146 (1994) 16

Black's Law Dictionary 1262 (3d ed. 1933) 6

Black's Law Dictionary 264 (8th ed. 2004) 22

Letter from Acting Secretary of Interior Kent Frizell to David Getches (Oct. 27, 1976) 13

Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs (Oct. 1, 1980) ("*1980 Opinion*") 5, 13

Hearing on S.2755 before the S. Comm. on Indian Affairs, 73d Cong. (May 17, 1934) 11, 12

Solicitor's Opinions 668 (1936) 14

Solicitor's Opinions 706 (1937) 14

Solicitor's Opinions 724 (1937) 14

Solicitor's Opinions 747 (1937) 14

Solicitor's Opinions 1394 (1946) 14

United States Dep't of Interior, Circular No. 3134, *Enrollment Under the IRA* 1 (March 7, 1936) 13

REPLY BRIEF FOR PETITIONER STATE OF RHODE ISLAND

This case concerns whether the State of Rhode Island will continue to exercise civil and criminal jurisdiction over all its lands. By taking the 31-acre parcel into trust on behalf of the Narragansett Indian Tribe, the Secretary will transfer sovereignty over the territory from the State to an Indian tribe. The legal rules advanced by the United States would allow the Secretary to reduce the State's sovereign jurisdiction over still more land in the State. Its position, however, cannot be reconciled with either the Indian Reorganization Act of 1934 (IRA) or with the Rhode Island Indian Claims Settlement Act (Settlement Act). In the IRA, Congress limited the trust taking authority to "Indians," a term Congress carefully defined to exclude tribes – such as the Narragansetts – that were not "under Federal jurisdiction" in 1934. In the Settlement Act, Congress implemented a negotiated and carefully balanced jurisdictional regime for the Tribe and the State that extinguished the possibility of further sovereign Indian-occupied lands outside the 1,800-acre Settlement Lands. Both statutes prohibit the Secretary from taking Rhode Island land into trust for the Narragansetts and compel rejection of the United States' position.

I. Section 5 of the Indian Reorganization Act of 1934 Does Not Apply to the Narragansett Indian Tribe.

The First Circuit concluded that the Secretary of the Interior may take land into trust under the IRA for members of the Narragansett Indian Tribe because, in

its view, they "are members of any recognized Indian tribe now under Federal jurisdiction." In its opening brief, the State demonstrated that conclusion was based on a misreading of the word "now." Statutes ordinarily are read from the perspective of the members of Congress that enacted them. A member of Congress in 1934 would have read the phrase "recognized Indian tribe *now* under Federal jurisdiction" as meaning "under federal jurisdiction on June 18, 1934," the date of the IRA's enactment. Any other reading would make the phrase superfluous; would render superfluous the word "hereafter" in other provisions of the IRA; and would be inconsistent with the statute's objectives and legislative history.

The United States' principal response is to offer a newly-developed argument, namely, that the definition of "Indian" in Section 19 is irrelevant. According to the United States, Section 5 of the IRA allows the Secretary to take land into trust for any "tribe," and "tribe" is defined without any temporal limitation. For the reasons set out below, that newfangled construction of the statute misreads both Sections 5 and 19. Nor does the United States' defense of the First Circuit's reasoning fare any better. When Congress inserted the words "now under Federal jurisdiction" into Section 19 it did so for a purpose: to limit the statute's benefits to a tightly-conscribed set of persons. The United States' construction of the IRA upsets the balance struck by Congress and should be rejected.

A. The Secretary is authorized to take land into trust only for "Indians" as defined in Section 19 of the IRA.

Section 5 of the IRA, 25 U.S.C. §465, authorizes the Secretary "to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." Until this case arrived in this Court, the Secretary's authority under this provision was universally understood as being limited by the definition of "Indian" in Section 19, 25 U.S.C. §479. The United States now argues, however, that "[t]he plural term 'Indians' ordinarily connotes tribes as well as individual Indians" (U.S. Br. 12), and that Section 5 therefore authorizes trust acquisitions for "tribes," defined in Section 19 "to refer to *any* Indian tribe, organized band, pueblo, or the Indians residing on one reservation" (emphasis added). That conflation of the terms "Indians" with "tribes" is unsupportable.

First, when the IRA intends to convey the concept of a "tribe," it uses the term "tribe"; when it intends to convey the concept of more than one "Indian," it uses the term "Indians." For example, Section 7 of the IRA authorizes the Secretary to add land to existing reservations, but provides that such lands "shall be designated for the exclusive use of *Indians* entitled by enrollment or by tribal membership to residence at such reservations." 25 U.S.C. §467 (emphasis added). Reading "Indians" to mean "tribes" in this provision would be nonsensical. The same is true of Section 12, which directs the Secretary "to establish standards . . . for *Indians* who may be appointed . . . to various positions maintained, now or hereafter, by the Indian office." 25 U.S.C. §472 (emphasis added). Clearly,

multiple, individual Indians – as defined in the first sentence of Section 19 – will be appointed to BIA positions, not tribes. *See also* 25 U.S.C. §476 (authorizing "[a]ny Indian tribe, or tribes, residing on the same reservation" to adopt a constitution "when ratified by a majority vote of the . . . adult Indians residing on such reservation"); 25 U.S.C. §478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians . . . vote against its application").

So too in Section 5, whose operative provision authorizes the Secretary "to acquire . . . any interest in lands . . . for the purpose of providing lands for *Indians*" – not "tribes." To be sure, the concluding paragraph of the provision speaks of the lands being put "in trust for the Indian tribe or individual Indian." But that paragraph is administrative in nature, and cannot change the meaning of the provision's opening paragraph setting forth the Secretary's trust-acquisition authority.

The Secretary's argument also undermines the very purpose of including a definition of "Indian" in Section 19. Congress did not include all persons of Indian descent or with any quantum of Indian blood in the benefits of obtaining land, BIA employment preferences, and so on. Congress therefore set precise limits on who qualifies as an "Indian" for purposes of the IRA. The first of those limits is that "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*" (emphasis added) – not "all persons of Indian descent who are members of any recognized Indian tribe." If, however, references in the

statute to more than one "Indian" mean a "tribe," that intentionally inserted limitation would disappear. The United States' newly-crafted reading of the IRA therefore violates of the rule against surplusage.

Finally, the United States' reading of the terms "Indian" and "tribe" in the IRA is contradicted by at least one previous Departmental discussion of the interrelationship between the two terms. The Associate Solicitor for Indian Affairs considered this issue in an opinion issued just two weeks after the land-to-trust regulations, 25 C.F.R. Pt. 151, were published. Memorandum from Hans Walker, Jr., Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs (Oct. 1, 1980) ("*1980 Opinion*"). He concluded that the terms "tribe" and "Indian" "must be read together," that is, "the requirements for Indian status must be read into the definition of 'tribe.'" *Id.* at 2. Reading the terms separately, he found, "would lead to results clearly not intended by Congress." *Id.* That is precisely the flaw in the United States' current position, and why it should be rejected.

B. The Narragansett Tribe is not a tribe "now under Federal jurisdiction" within the meaning of Section 19 of the IRA.

1. The text of the IRA unambiguously excludes the Narragansett Tribe.

a. The Narragansett Tribe asked the Secretary to take the Parcel into trust based on its claim that its members are "members of [a] recognized Indian tribe

now under Federal jurisdiction." Because the Narragansett Tribe was not a "recognized [in 1934] tribe now under Federal jurisdiction," its application should have been denied. As the State explained in its opening brief (R.I. Br. 22-25), statutes are construed based on their meaning on the date of enactment, *i.e.*, as their framers would have understood them. A member of Congress in 1934 reading the words "now under Federal jurisdiction" would have understood that clause as referring to "under Federal jurisdiction" as of 1934. This Court presumably inserted "[1934]" into that clause in *United States v. John*, 437 U.S. 634, 650 (1978), precisely because that is the natural reading of the phrase.

The United States offers no direct response to this argument. It does not dispute that statutes are read from the perspective of their enactors. Nor does it seriously dispute that a person reading the IRA in 1934 would naturally read "now" in Section 19 as referring to 1934. In fact, the United States acknowledges that the word "now" in a statute "'ordinarily refers to the date of its taking effect.'" U.S. Br. 15 (quoting *Black's Law Dictionary* 1262 (3d ed. 1933)). The United States asserts, however, that "now" "sometimes" can "refer 'to a time contemporaneous with something done.'" *Id.* That may be true, but it hardly means that any time a statute uses the word "now," its meaning is ambiguous.

Consistent with the rule that statutes are read from the vantage point of their enactors, the word now means "the date of its taking effect" unless the statutory context unmistakably points in the other

direction. Two good examples are provided by the United States: the Social Security Benefits Amendments of 1984 and the federal statute establishing the Environmental Education Advisory Council. U.S. Br. 18. The former statute uses the word "now" in a provision addressing future benefits based on "new evidence" and on whether "the individual is now able to engage in substantial gainful activity." 42 U.S.C. §423(f). The only possible meaning of "now" in that provision was the time the future benefits were sought.

Likewise, 20 U.S.C. §5508(d)(1)(E) instructs the Environmental Education Advisory Council to conduct biennial reports that "describe and assess the extent and quality of environmental education programs available to senior Americans," which would recommend "coordinat[ion] with" organizations "now in existence." Any member of the 1990 Congress that enacted the statute would have thought it preposterous to direct the Council in, say, 2006, to evaluate the coordination of seniors' environmental organizations with only those environmental institutions that existed in 1990. Absent a context of that sort, however, the word "now" is read like any other statutory term – as of the date of enactment.

b. The statutory context of the IRA not only fails to support reading "now" in Section 19 in a forward-looking manner; it bolsters giving "now" its "ordinar[]y" date-of-enactment meaning. As the United States concedes (U.S. Br. 19), the word "now" is used several times elsewhere in the IRA to mean the date of enactment. And as discussed in the State's opening brief (R.I. Br. 25-26), the United States'

interpretation of "now" cannot be reconciled with 25 U.S.C. §§468 and 472. Section 468 prohibits certain Indian holdings "outside the geographic boundaries of any Indian reservation now existing or established hereafter." Section 472 requires the Secretary to establish standards for appointment "positions maintained, now or hereafter, by the [BIA]." Under the United States' view that "now" means "at the time of the statute's application" (U.S. Br. 15), the words "or established hereafter" and "or hereafter" in §§468 and 472 would be surplusage. In §468, Indian holdings "now existing or established hereafter" would mean the same as Indian holdings "now existing." And in §472, the positions maintained "now or hereafter, by the [BIA]" would mean the same as positions maintained "now by the [BIA]." Of course, that reading violates the basic tenet that statutes should be construed so that "no clause, sentence, or word, shall be superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

The United States provides no response to this argument, and instead argues merely that Congress did not use the phrase "now or hereafter" in Section because that would have wrongly included members of tribes that were under federal jurisdiction in 1934, but were no longer under federal jurisdiction when the trust application was made. U.S. Br. 19-20. If that were Congress's intent, however, it could have simply delete the word "now." The phrase "members of any recognized Indian tribe under Federal jurisdiction" would have conveyed that very meaning. The United States' position thus violates the rule against surplusage again.

Finally, the United States asserts that the "fluid" nature of the term "now" is shown by Congress's reference to "on June 1, 1934" in §479, and by its reference to "the passage" of the Act in §§474 and 478. U.S. Br. 16. The former example is unavailing; the IRA was enacted on June 18th not June 1, 1934. Only by expressly using the June 1 date could Congress have conveyed its precise intent. The latter two examples merely show that Congress sometimes conveys the same meaning in different ways based on syntax concerns. Section 478, for example, required the Secretary to call an election "within one year after the passage and approval of this Act." It would have been exceedingly awkward to rephrase the sentence to "within one year of now" and hardly means that Congress intended to give "now" in Section 19 something other than its ordinary meaning.

c. As a last resort, the United States argues that even if "now" in Section 19 means 1934, the State's position fails because Section 19 states only that the term "Indian" "shall include" the three listed categories. U.S. Br. 26-27. In the United States' opinion, this means that the listing "is illustrative rather than exclusive" (U.S. Br. 26) and that the Secretary may add any number of additional categories to the definition. That cannot be correct, for it would undermine Congress's carefully crafted effort to temporally limit the scope of the IRA. It may be true that "the word 'includes' is usually a term of enlargement." *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008), *quoted in* U.S. Br. 26. But it is not a word of enlargement when the statutory text, context, and legislative history dictate otherwise. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989).

Under the United States' reading of the statute, the IRA must cover "all . . . persons of one-half or more Indian blood," but the Secretary may "fill" a "gap" (U.S. Br. 26) by extending the statute's coverage to "all . . . persons of one-thousandth or more Indian blood." There is, however, no gap to fill. Congress, after careful deliberation, amended the statute so that it no longer covered persons of one-fourth Indian blood. And it likewise amended the statute to cover only members of recognized tribes "now under Federal jurisdiction." Congress surely did not authorize the Secretary to, in effect, delete its amendments. Section 19's definition was not setting forth minimum standards; it was demarcating which persons of Indian descent could avail themselves of the statute's benefits.

2. The background of the IRA confirms that "now" means June 18, 1934.

a. The core purpose of the IRA was to "repudiate[] the practice of allotment," *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001), and to "[r]eturn to the principles of tribal self-determination and self-governance which had characterized the" pre-allotment policy. *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 255 (1992). It therefore made eminent sense for Congress to limit the first category of "Indians" in Section 19 to members of tribes that had been subjected to the allotment policy. *See* R.I. Br. 29-30.

The United States responds that the IRA as a whole, and Section 5 in particular, had additional goals as well. U.S. Br. 22. That is certainly true, and

explains why the term "Indian" is not limited to members of tribes that were under federal jurisdiction in 1934. Even persons who are not members of such tribes can benefit from the IRA, including Section 5, if they can demonstrate that they possess one-half or more Indian blood. But the statute had to draw lines with respect to the class of individuals who could obtain its benefits. One line was requiring one-half Indian blood, rather than one-quarter Indian blood. Another was allowing persons with less than one-half Indian blood to obtain the act's benefits only if they were members (or descendants of members) of a tribe that had borne the hardships of the allotment policy.

b. The legislative history of the IRA confirms that Congress intended to limit the statute's benefits to (1) members of recognized tribes under federal jurisdiction in 1934, (2) descendents of such members if they resided on the tribe's reservation shortly before enactment of the statute; and (3) "all other persons of one-half or more Indian blood." During the hearing at which the phrase "now under Federal jurisdiction" was added, Senator Thomas asked how the statute would treat groups of Indians that "are not registered; . . . not enrolled; . . . not supervised. They are remnants of a band." *Senate Hearing* 263. Chairman Wheeler responded that "this bill is being passed . . . to take care of the Indians that are taken care of at the present time" and asked "how are you going to take care of them unless they are wards of the Government at the present time?" *Id.*

Chairman Wheeler was concerned, however, that the IRA would also cover "all other Indians who are one-fourth blood. I do not think that should be done.

If they are one-half blood, that is certainly the very limit to which we should go in my judgment." *Id.* at 264. When he added the phrase "now under Federal jurisdiction," Commissioner Collier sought to meet Chairman Wheeler's twin concerns: that the statute be limited to "wards of the Government at the present time" and to half-blood Indians. In Collier's words:

> Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. at 266. The natural meaning of Commissioner Collier's words, to anyone listening in 1934, is that the statute would be limited to Indians "now" (at that time) "under federal jurisdiction" – not to tribes who only are placed under federal jurisdiction some 50 years later.

3. Until it adopted its trust-acquisition regulations in 1980, the Secretary routinely construed "now" to mean June 18, 1934.

The United States supports its position by asserting that the Secretary has long construed Section 19 consistently with its current position. Of course, the Secretary's course of interpretation cannot undo the unambiguous meaning of the statute. Moreover, the United States' argument fails on its own terms. Prior to its issuance of the trust-acquisition regulations in September 1980, the Department of

Interior almost invariably construed "now" in Section 19 to mean the date of the IRA's enactment.

Most notably, Commissioner Collier himself wrote in a 1936 Circular that "the term 'Indian' as used [in the IRA] shall include – (1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act . . . ." United States Dep't of Interior, Circular No. 3134, *Enrollment Under the IRA* 1 (March 7, 1936). Commissioner Collier then repeated that reading of the statute in the next paragraph of the Circular. *Id.* The United States counters (U.S. Br. 35) that the Circular used the "shall include" language, but Commissioner Collier did not even hint that the three listed categories of Indians could be expanded. This Circular merits particular weight because it provides the official position of the Office of Indian Affairs shortly after passage of the IRA on the administration of the very provision at issue. And it carries far more weight than the fact that several other regulations issued by the Secretary over the years, unrelated to Section 19, use the word "now" in the "fluid" sense. *See* U.S. Br. 30-32.[1]

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[1] *See also* Letter from Acting Secretary of Interior Kent Frizell to David Getches (Oct. 27, 1976), at 8 ("[b]ased on his analysis of the statutory language and legislative history, the Solicitor has some doubts that the Department can take land in trust under 25 U.S.C. §465 for tribes that were not administratively recognized on the date of the act, (June 18, 1934), ..."); *1980 Opinion* 6 ("it is clear that the definition of Indian requires that some type of obligation or extension of services to a tribe must have existed in 1934").

To counter this history, the United States points to several other Solicitor opinions issued in the 1930s and 1940s in which "[t]he Solicitor did not say that 'now' meant the date of the IRA's enactment." U.S. Br. 32-33. In none of those opinions, however, was the meaning of "now" at issue. For example, the 1936 opinion concluded that it was "incorrect" for certain deeds of trust land to "designate[] the grantee as the United States in trust for the Choctaw Tribe of Mississippi." *Solicitor's Opinions* 668, 668. This is so, the Solicitor reasoned, because "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." *Id.* Quite obviously, land cannot be taken into trust for an entity that does not exist. The opinion did not even mention that first category of "Indian" in Section 19. *See also Solicitor's Opinions* 706, 706 (1937) (merely parroting the statute's language in stating that "Section 19 defines the word Indians as used therein to include (1) all persons who are members of any recognized Indian tribe now under Federal jurisdiction, (2) . . . .").

Several other opinions cited by the United States involved whether a group of Indians could organize under Section 16 of the IRA – a provision that does not contain a "recognized Indian tribe now under Federal jurisdiction" clause. *See Solicitor's Opinions* 724, 725 (1937) (finding that the St. Croix Indians could not organize under Section 16 of the IRA because they "now present no characteristics entitling them to recognition as a band"); *Solicitor's Opinions* 747, 748 (1937) (similar finding with respect to the Nahma and Beaver Island Indians); *Solicitor's Opinions* 1394, 1394 (1946) (finding evidence insufficient to permit the Burns Paiute Indian Community to adopt a

constitution under Section 16). In the end, the United States is unable to cite to even a single opinion or circular written by the Department prior to its adoption of the trust-acquisition regulation in September 1980 that contradicted Commissioner Collier's 1936 Circular. This history undermines, rather than supports, the United States' claim of ambiguity.

4. Congress did not amend the definition of "Indian" in §479 in later-enacted statutes.

The United States finally argues that some "enactments since the passage of the IRA reinforce the reasonableness of the Secretary's interpretation of his trust acquisition authority." U.S. Br. 36-37. In particular, the United States argues "that Congress legislated on th[e] premise" that the Secretary's construction of the IRA is correct. *Id.* at 39. A closer look at the statutes belies that contention.

a. 25 U.S.C. §§476(f) and (g). In 1994, Congress amended Section 16 of IRA, 25 U.S.C. §476, to prohibit the executive branch from "enhanc[ing] or diminish[ing] the privileges and immunities" afforded to a federally recognized Indian tribe "relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. §§476(f), (g). The United States argues that Congress added these provisions to the IRA in 1994 to "articulate a principle of equality among recognized tribes." U.S. Br. 37. To the contrary, this amendment to Section 16 has nothing to do with and does not mention the definition of "Indian" in Section 19. And its purpose, as revealed in the

legislative history, shows that Congress adopted it for reasons wholly unrelated to Section 19's distinction between tribes that were, and were not, under federal jurisdiction in 1934.

Senators McCain and Inouye introduced the legislation because the Secretary had been distinguishing between tribes that were "created" and those that were "historic." 140 Cong. Rec. S 6146 (1994) (statement of Sen. McCain). Tribes that resided on their "aboriginal homesteads" were considered "historic"; "[t]ribes for whom reservations were established in areas to the west of their traditional lands," although existing for centuries, were considered "created." *Id.* (statement of Sen. Inouye). The Senators objected to the Secretary's view that, under Section 16, "created tribes are only authorized to exercise such powers of self-government as the Secretary may confer." *Id.* (Sen. McCain); *see id.* (Sen. Inouye) (Section 16 properly construed as having "no substantive effect on inherent tribal sovereign authority"). Simply put, §§476(f) and (g) were designed to ensure that *all* recognized tribes be understood as "exercis[ing] powers of self-governance by reason of their inherent sovereignty." 140 Cong. Rec. S 6146 (Sen. McCain). The provisions had nothing to do with the entirely different issue of when the United States would take land into trust for tribes, an action that is distinct from tribe's inherent powers.[2]

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[2] Moreover, a January 4, 1994, letter from the Acting Assistant Secretary of Indian Affairs to the Chair of the House Committee on Natural Resources on the very issue of "created" and "historic" tribes stated (at 3) that "Section 19 of the IRA defined 'Indians' not only as 'all persons of Indian descent who are members of any

b. The List Act, 25 U.S.C. §479a. The List Act merely mandates that the Secretary publish and regularly update a list of all recognized Indian tribes that are "eligible" for "special programs and services." It does not mandate that all tribes be entitled to identical trust acquisition rights; and it does not reference the IRA. The United States argues that the "List Act contemplates that federal benefits extend equally to all tribes on the list, without regard to when the tribe attained federal recognition," but that contention is utterly without foundation. The terms of the Act say nothing about *all* federal benefits extending equally to *all* tribes.

c. IGRA. The United States next argues that the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.*, impliedly assumes that all tribes placed under federal jurisdiction after 1934 may avail themselves of Section 5 of the IRA. U.S. Br. 38-39. The United States points to §2719(B)(1)(B)(ii), which allows gaming on "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process." U.S. Br. 39. According to the United States, this "exception presupposes that the Secretary has authority to take land into trust for the benefit of tribes that he first recognized after 1934."

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recognized *[in 1934]* tribe under federal jurisdiction' and all their descendents who then were residing on any Indian reservation, but also 'all other persons of one half or more Indian blood" (emphasis added). Given that representation of the meaning of Section 19, as well as this Court's identical interpretation of Section 19 in *United States v. John*, 437 U.S. 634, 650 (1978), Congress presumably read Section 19 as the State does – yet took no steps to amend that definition in its 1994 legislation.

Id. The United States is correct that the provision "presupposes" that the Secretary may take land into trust for *some* tribes first recognized after 1934. But the United States is incorrect that this somehow supports its construction of Section 19.

Congress has enacted laws that specifically made the IRA applicable to tribes recognized after 1934. For example, in *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, et al.* 78 F. Supp. 2d 699 (W.D. Mich. 1999), *remanded on other grounds*, 288 F.3d 910 (6th Cir. 2002), the court held that the Secretary properly took land into trust for the Little Traverse Bay Bands of Ottawa Indians and allowed gaming on those lands under §2719(B)(1)(B)(ii). The court reached that conclusion based on 1994 legislation that reaffirmed federal recognition of the bands and specifically provided that the "Secretary shall acquire real property . . . for the benefit of the [bands]." 78 F. Supp. 2d at 702 (quoting 25 U.S.C. §1300k-4(a)); *see also* Hoopa-Yurok Settlement Act, Pub. L. No. 100-580 (1988) (making the IRA applicable to a newly-recognized tribe); Coquille Restoration Act, Pub. L. No. 101-42 (1989) (same). Accordingly, §2719(B)(1)(B)(ii) has operative effect regardless of who prevails in this case. The provision does not, therefore, implicitly amend the IRA or indicate that the 1988 Congress that enacted IGRA read Section 19 differently than this Court did in *United States v. John*.

d. 25 U.S.C. §2202. Lastly, the United States points to federal laws that extended benefits of the IRA "to tribes that voted under Section 18 to opt out of the IRA." U.S. Br. 39 (citing 25 U.S.C. §2202). The United States suggests that "[i]t would be incongruous

to give those tribes a second chance to benefit from those IRA provisions if Congress believed that those provisions did not apply to newly-recognized tribes." *Id.* Not so. As discussed above, Congress sought to restrict some of the IRA's benefits to half-blood or more Indians and to Indians who were *then* wards of the federal government, *i.e.*, members of recognized tribes "now under Federal jurisdiction." Providing IRA benefits to tribes who were under federal jurisdiction in 1934, but initially opted out of the IRA, is consistent with that congressional intent. Providing IRA benefits to tribes who were *not* under federal jurisdiction in 1934 is not.

As noted, Congress has sometimes granted tribes the power to take lands into trust as part of an initial reservation or restored lands. To the extent, therefore, that any tribe has relied to its detriment on a mistaken belief that its members qualified as "Indians" under the first category in Section 19, there is a ready remedy: seeking relief from Congress. The remedy is not for this Court to read the phrase "now under Federal jurisdiction" out of the statute.

II. The Settlement Act Extinguished "All Claims" To Further Indian Occupied Trust Land And Indian Country In Rhode Island.

As explained in the State's opening brief, the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§1701 *et seq.*, explicitly and unconditionally extinguished the Tribe's right to claim sovereign regulatory authority over land in Rhode Island outside the Settlement Lands. The Settlement Act did this by expressly declaring that "*all claims* by the Narragansett Tribe of

Indians or any predecessor or successor in interest ... *arising subsequent to the transfer* [of land] and based upon any interest in or right involving such land ... (including but not limited to claims for trespass damages or claims for use or occupancy) shall be regarded as extinguished as of the date of the transfer." 25 U.S.C. §1705(a)(3). This straightforward reading of the statute effectuates its purpose, which was to resolve a dispute over the Tribe's claims to 3,200 acres of land by giving the Tribe 1,800 – but only 1,800 – acres of its former aboriginal lands (the Settlement Lands). And even on those lands, the Tribe was given only limited regulatory authority.

The United States responds by arguing that (1) "the extinguishment provisions settle only claims based on past land transactions, and do not speak to any future land acquisitions" (U.S. Br. 43); (2) "neither the Secretary nor the Tribe is asserting any 'claim' at all" during the trust-acquisition process (U.S. Br. 44); and (3) a comparison to other settlement acts supports its construction of the Settlement Act (U.S. Br. 46-49). None of those arguments has merit. The extinguishment language in §1705(a)(3) is *not* limited to "claims based on past land transactions"; the tribe's request that the land be taken into trust *is* a "claim . . . based upon any interest in or right involving land"; and the other settlement acts upon which the United States relies are distinguishable.

A. The plain language of the Settlement Act extinguished the Narragansetts right to assert land claims in Rhode Island.

1. The Settlement Act deemed all prior Indian land transfers in Rhode Island to have been lawful, 25 U.S.C. §1705(a)(1); extinguished aboriginal title based on such transfers, *id.* §1705(a)(2); and then extinguished all "subsequent" Indian land claims, including "claims for use and occupancy." *id.* §1705(a)(3). Because the entire State of Rhode Island was originally tribal land, these provisions cover the entire State. And they surely cover the 31-acre Parcel, which the Tribe originally owned and sought to regain in the 1975 lawsuit prompting the Act. Accordingly, the Settlement Act bars the Narragansetts from asserting "claims" to "use and occupancy" of Rhode Island land generally and the Parcel specifically.

The United States counters that §1705(a)(3) does not cover *all* "subsequent" Indian land claims. Rather, it covers only "claims arising subsequent to the retroactively-approved transfers *based on* the alleged invalidity of those transfers." U.S. Br. 44 (emphasis in original). The problem with this argument is that the statute says no such thing. Section 1705(a)(3) applies to "subsequent" claims that are "*based upon* any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use or occupancy)" (emphasis added). The claims do not have to be "based upon" "the alleged invalidity of [the retroactively-approved] transfers." This Court "ordinarily resists reading words or elements into a statute that do not

appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). The limitation on §1705(a)(3) proposed by the United States does not "appear on" the "face" of the "all claims" extinguishment provisions of the Settlement Act.

2. The United States and the Tribe in its amicus brief further contend that the assertion of a federal trust is not a "'claim' at all" but merely a request for the Secretary to exercise his discretionary trust authority. U.S. Br. 45; Tribe Br. 16–17. Such reasoning blinds itself to the essence of the Tribe's actions. As it acknowledges, "the Secretary's taking land into trust is the preferred mechanism for Indian tribes to acquire land and assert sovereign control over it when they lack the unilateral ability to gain possessory rights . . . or to assert sovereignty over the land." Tribe Br. 19. No one disputes that the Tribe has possessory rights in the 31 acres as a landowner and can build its housing development without a trust conversion. It sought a federal trust to regain "sovereign control over land" and to divest the State of its regulatory jurisdiction.

That effort to gain sovereign authority fits well within the definition of a "claim." That word is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by a court; [t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional; [a] demand for money or property to which one asserts a right." *Black's Law Dictionary* 264 (8th ed. 2004). The Tribe's assertion of "sovereign control over land" is a "claim" for "any interest in or right involving land." The Settlement Act therefore extinguished it.

3. The United States and the Tribe devote considerable energy to the propositions that the Settlement Act did not explicitly repeal the Secretary's trust-acquisition authority and that repeals by implication are disfavored. *See* U.S. Br. 41-43; Tribe Br. 13-15. Section 1705(a)(3), however, *explicitly* bars the Tribe from asserting "use and occupancy" claims in connection with Rhode Island land. The Tribe's claim to sovereignty over the Parcel is precisely such a claim.

It is no doubt true that Congress could have included a specific reference to trust acquisitions in §1705(a)(3). But Congress reasonably used the expansive words "all claims," which by definition encompasses claims arising out of the trust acquisition process. Rules regarding implied repeals have no relevance here. This is a case where Congress has spoken to a specific controversy with an equally specific statute. *See, e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) ("[t]his Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision"). Likewise, it is true that §1708 speaks only to the Settlement Lands being subject to state regulatory authority. There was no reason, however, to address the remainder of the State because, of the whole, only the Settlement Lands were entitled to *any* form of special treatment in terms of state law applicability.

Nor do the specific limitations on trust acquisitions in other settlement acts offset the explicit extinguishment of claims present in the Rhode Island act. *See* U.S. Br. 46-48 (discussing 1980 Maine

Settlement Act, 25 U.S.C. §§1721 *et seq*; 1983 Mashantucket Pequot Settlement Act, 25 U.S.C. §§1751 *et seq*.; and 1987 Wampanoag Tribal Council of Gay Head Settlement Act, 25 U.S.C. §§1771 *et seq*.). Each of these acts provided federal recognition to the tribe involved; authorized the Secretary to take settlement lands into trust for the tribe in certain specified circumstances; and then prohibited the Secretary to take lands into trust for the tribe when those circumstances were not present. Because the Rhode Island act does not authorize the Secretary to take land into trust for the Tribe in the first place – indeed, the act precludes it – there was no need for specific language defining the contours of that authority. Indeed, these other Settlement Acts demonstrate that, unlike here, when Congress intends to permit trust acquisitions following settlement acts, it says so explicitly.

4. In addition, this Court "presume[s], consistent with well-established principles of statutory interpretation, that Congress [is] aware of the relevant legal context when it passe[s]" legislation." *Lane v. Pena*, 518 U.S. 187, 202 (1996). And, Congress is presumed to be aware of this Court's decisions. *See Whitfield v. United States*, 543 U.S. 209, 216 (2005). This principle bears on the Settlement Act's meaning and strongly supports the proposition that Congress did not intend that any Rhode Island land be taken into trust for Tribe outside the Settlement Lands.

Three months before Congress enacted the Settlement Act, this Court in *United States v. John* construed the phrase "now under Federal jurisdiction" in Section 19 of the IRA as referring only to tribes that

were recognized "[in 1934]." 437 U.S. at 650. The Fifth Circuit reached the same conclusion several years before *John*. *See United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974). The Narragansett Tribe, of course, was not recognized in 1934. Accordingly, when Congress enacted the Settlement Act it understood that, even if the Narragansetts later became federally recognized (as contemplated by the Settlement Act), it would not be entitled to use the trust-acquisition process.

5. Finally, ANCSA provided the model for the Rhode Island Settlement Act, and the Solicitor of the Department of the Interior has concluded that ANCSA prohibits trust acquisitions in Alaska. *See* R.I. Br. 43-44. The United States and the Tribe point to various discrete differences between the Settlement Act and ANCSA, but they miss the forest for the trees. Both were comprehensive land claims settlement acts with broad extinguishment provisions. *Compare* 43 U.S.C. §1603 (b), (c) (extinguishing "all claims" based on "aboriginal right, title, use, or occupancy"), *with* 25 U.S.C. §1705(b)(3) (extinguishing "all claims" based upon any interest in or right involving land including claims for "use and occupancy"). Through ANCSA, Congress eliminated Indian country in Alaska. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The Settlement Act did the same for Rhode Island.

The United States asserts (U.S. Br. 50-51) that the 1978 Solicitor's Opinion cited by the 1993 Solicitor's Opinion has been rescinded. The United States does not, however, assert that the 1993 Opinion has been rescinded. And *that* opinion concluded "it would be an

abuse of discretion for the Secretary to take lands in trust" in Alaska because ANCSA "left little or no room for tribes in Alaska to exercise governmental authority over land." Outside the Settlement Lands, the same is true in Rhode Island.

B. The United States' position would undermine the jurisdictional bargain struck by the parties and ratified by Congress.

The Settlement Act ratified a carefully measured compromise reached between the State, the Town, and the Tribe. In exchange for transferring 1,800 acres of land to the Tribe, "[f]ederal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, involving land in Rhode Island." J.A. 24a-25a (JMOU ¶6). In this manner, the Tribe attained a specified land base, while the State and Town received assurance that the rest of the State was free from claims of tribal regulatory authority. The avowed purpose of the attempted trust conversion, however, is to "reestablish sovereign authority over" the 31-acre Parcel and create federal Indian country, to the exclusion of state law and jurisdiction. U.S. Br. 43. Such a reestablishment of tribal sovereign authority is incompatible with the purpose of the Settlement Act and JMOU.

The United States asserts that "[t]he State and the private landowners obtained the relief they sought: the clearing of clouds on title to 3200 acres of land." U.S. Br. 52. Likewise, the Tribe contends that "[t]he acquisition of trust land outside the Settlement Lands . . . has no connection to the 'claims' the Settlement Act

resolved." Tribe Br. 25. The sweeping scope of the Settlement Act contradicts those assertions. The Act did far more than resolve title to 3,200 acres. By its undisputed terms, §1705 covers transfers made by the Narragansett Tribe anywhere in the United States; and §1712 extinguishes all tribal claims by any Indian tribe throughout the entire State of Rhode Island. In enacting the Settlement Act, Congress did far more than ratify the disposition of 3,200 disputed acres. It resolved the status of Indian land claims statewide.

Moreover, if the United States and Tribe are correct, the State received very little. It gave up 1,800 acres of Settlement Lands and in return "clear[ed] the clouds" on title to the balance of Rhode Island only up till the point at which the Secretary chooses to convert it to Indian country. "[A]ll Indian claims of any kind . . . involving land in Rhode Island," J.A. 24a, are *not* "eliminate[d]", *id.*, if the Tribe may gain "use and occupancy" rights on tens, hundreds, or thousands of acres of land in the State through the trust-acquisition process.

Finally, the United States and the Tribe cannot explain why Congress would have wanted the anomalous result they ask this Court to endorse: restricting state authority dramatically on the 31 acres, but not on the Settlement Lands – the heart of the Tribe's aboriginal home. Even there, however, the Settlement Act provided that state criminal and civil jurisdiction would obtain, except for certain hunting and fishing regulations. 25 U.S.C. §§1706, 1708. By contrast, they would oust state jurisdiction on the 31 acres and other future trust lands. The Tribe and the United States claim that this is the ordinary

consequence of having land taken into trust, U.S. Br. 43-44; Tribe Br. 27, but that misses the point. It is inconceivable that the settling parties and Congress would have intended that the Settlement Lands be the one place in Rhode Island where the Tribe's potential regulatory authority is the least, and where the State's regulatory authority is the most protected.[3]

The Tribe points to two cases – *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005), and *Cass Co. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 101, 115 (1998) – for the proposition that tribes may regain "sovereign control" over land they lost through trust conversion. Tribe Br. 11. There is, however, a fundamental difference between those cases and this one. In *Sherrill*, no federal statute extinguished the tribe's use and occupancy rights; in *Cass County*, neither of the two statutes that made the reservation land alienable (the Nelson Act and the General Allotment Act) purported to extinguish any "claim" related to tribal "use and occupancy" that had or might arise with respect to the lands. Here, Congress expressly extinguished the Tribe's "use and occupancy" rights. Congress thereby eliminated any basis for tribal regulatory authority over land and

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[3] The Tribe asserts that "[w]hen the federal government took the Settlement Lands into trust on behalf of the Tribe, these lands were by their very nature, set aside for the Tribe and thus Indian country. See 18 U.S.C. §1151(a)." Tribe Br. 26. That contention cannot be reconciled with 25 U.S.C. §1708, which expressly declares that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State." The precise implications of the Settlement Lands having been taken into trust are not, of course, before this Court.

denied the Tribe any special land-status rights *in futuro*. The Settlement Act prohibits any further Indian occupied lands in Rhode Island.

Conclusion

For all the foregoing reasons and those advanced in the State's opening brief, this Court should reverse the judgment below.

Respectfully submitted,

PATRICK C. LYNCH
ATTORNEY GENERAL

Neil F.X. Kelly *
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284
NKelly@riag.ri.gov
Counsel for Petitioner
State of Rhode Island

* *Counsel of Record*

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REPLY BRIEF

106

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In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONER TOWN OF CHARLESTOWN, RHODE ISLAND

JOSEPH S. LARISA, JR.
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700
joe.larisa@verizon.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONER TOWN OF CHARLESTOWN 1

I. THE SECRETARY'S 1980 IRA TRUST REGULATIONS ARE ENTITLED TO NO DEFERENCE 4

A. Congress has not Authorized the Secretary to Promulgate Regulations for Sections 465 or 479 of the IRA 6

B. The 1980 Regulations Provide no Support for the Secretary's New Interpretation of the IRA as Including "All Tribes" 11

1. The regulations do not interpret the IRA to avoid the "recognized [in 1934] tribe" test 11

2. The Secretary has consistently rejected the interpretation of Sections 465 and 479 he proffers in this case 15

II. NO AMENDMENT TO THE IRA REPEALS SECTION 479'S TEMPORAL LIMITATION 19

III. THE SECRETARY WRONGLY READS THE SETTLEMENT ACT'S EXTINGUISHMENT PROVISIONS AS ALLOWING CLAIMS OF INDIAN SOVEREIGNTY OVER LAND THROUGHOUT RHODE ISLAND 23

TABLE OF CONTENTS – Continued

Page

IV. IF TRUST IS ALLOWED, STATE JURISDICTION MUST BE PRESERVED TO HARMONIZE THE IRA WITH THE SETTLEMENT ACT 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) 7

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 6, 18

Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) 27

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 26

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 4, 6, 7, 15, 18

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) 25

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) 27

Gonzales v. Oregon, 546 U.S. 243 (2006) 7, 19

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 10

Morton v. Mancari, 417 U.S. 535 (1974) 28

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) 18

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 9

Pipefitters Local Union No. 526 v. United States, 407 U.S. 385 (1972) 27

Rapanos v. United States, 547 U.S. 715 (2006) 5

TABLE OF AUTHORITIES – Continued

Page

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ...6, 15, 19

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 5

United States v. John, 437 U.S. 634 (1978) 14

United States v. Mead Corp., 533 U.S. 218 (2001) 7, 15

Watt v. Alaska, 451 U.S. 259 (1981) 17

STATUTES

25 U.S.C. § 9 ..... 8, 9, 10

25 U.S.C. § 463e 7

25 U.S.C. § 465 ..... *passim*

25 U.S.C. § 466 7

25 U.S.C. § 470 7

25 U.S.C. § 472 ..... 8, 23

25 U.S.C. § 476(a) 21

25 U.S.C. § 476(f) 20, 21

25 U.S.C. § 476(g) 20, 21

25 U.S.C. § 479 ..... *passim*

25 U.S.C. § 479a 19, 20

25 U.S.C. § 1708(a) 23

25 U.S.C. § 2201(1) 22

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. § 2202 ..... 19, 21

25 U.S.C. § 2203 22

TREATISES

Felix S. Cohen, Handbook of Federal Indian Law (N.J. Newton et al. eds. 2005) 9

OTHER MATERIALS

25 C.F.R. 151.2(b) 4, 11

25 C.F.R. 151.2(c)(1) 12

25 C.F.R. 151.3 12

25 C.F.R. 151.3(a) 12

Department Circular From Commissioner Collier dated March 7, 1936 16

Letter from Acting Secretary to David Getches dated October 27, 1976 ..... 14, 16

Memorandum from the Associate Solicitor dated October 1, 1980 16

Letter from the Acting Assistant Secretary to George Miller dated January 14, 1994 ..... 14, 16

REPLY BRIEF OF PETITIONER TOWN OF CHARLESTOWN

In an effort to inject ambiguity into an otherwise straightforward temporal limitation contained in Section 479 of the Indian Reorganization Act (the "IRA" or "1934 Act"), the Secretary unleashes a flurry of arguments to support an interpretation of "now" in the IRA as meaning "later." Outside of this litigation, however, the Secretary has for more than 70 years consistently interpreted Section 479 as including only "recognized [in 1934] tribes now under federal jurisdiction." The Secretary's longstanding agreement with Petitioners' interpretation of the IRA is evidenced by the Secretary's own newly disclosed legal opinions as well as administrative practice.

Perhaps the most persuasive interpretation by the Secretary was the one made closest in time to passage of the 1934 Act, by the principal drafter of both the Act and the very language at issue here – an interpretation that was actually applied by the Secretary to the Narragansett Indian Tribe itself. On March 7, 1936, Commissioner John Collier authored a Department "Circular" interpreting the IRA in precisely the same manner as Petitioners. A year later (three years after passage of the IRA), the Secretary applied the temporal limitation to the Narragansett, informing the Tribe that no act of Congress applied to it. The interpretation of Section 479 by the IRA's architect, as including only members of "a recognized tribe that was under Federal jurisdiction at the date of the Act," has been followed by

the Secretary to the present almost without exception, and is demonstrably correct. The Secretary's recent reinterpretation of Section 479 is wrong.

The Secretary places great reliance on 1980 trust acquisition regulations, which he claims interpret Sections 465 and 479 of the IRA as applicable to all federally recognized tribes, and not just to those federally recognized and under federal jurisdiction in 1934. He asserts that these regulations are entitled to substantial deference. These regulations are entitled to no such deference. First, Congress never authorized the Secretary to promulgate regulations relating to either Section 465 or 479, even though it specifically authorized regulations pursuant to four other sections of the IRA. Second, the regulations nowhere define "Indian" differently than the limited definition contained in Section 479 (they define only "tribe" and "Individual Indian"). Third, the regulations expressly require and relate back to "the provisions contained in" an act of Congress authorizing trust. Here, that act is the IRA, and its Section 479 definition of "Indian" excludes the Narragansett.

Indeed, the Secretary has been adhering to the temporal limitation of Section 479 since the moment the IRA was first enacted. For at least the first 46 years after passage of the IRA, the Secretary did not take land into trust for a single Indian tribe that was not recognized and under federal jurisdiction in 1934.

Since then, the Secretary has taken only one administrative action inconsistent with this position.[1] There is no sound legal basis for the Court to defer to the Secretary's interpretation of Sections 465 and 479 proffered in this case. Moreover, while the Secretary and amici argue that amendments to the IRA scuttle the "recognized [in 1934] tribe" test, no amendment changes a word of that limitation.

The Secretary also reads the Rhode Island Indian Claims Settlement Act's ("Settlement Act") extinguishment provisions far too narrowly. Effect must be given to the Settlement Act's clear extinguishment of Indian claims to sovereignty over land in Rhode Island by ensuring the continued ability of the State to apply its laws and jurisdiction to land throughout Rhode Island. That can be achieved either by prohibiting the Secretary from taking the Parcel into trust *or* by restricting any trust to prohibit the creation of Indian country and the resulting assertion of Indian territorial sovereignty. The "restricted trust" jurisdictional framework applies today on the Settlement Lands. It would defy law and logic to read the Settlement Act to permit the ouster of State laws and jurisdiction everywhere in Rhode Island except in the heart of the Tribe's ancestral home.

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[1] While the Secretary apparently took land into unrestricted trust for one tribe, the Tunica-Biloxi, that did not meet the "recognized [in 1934] tribe" test, he also denied trust for another tribe, the Stillaguamish, which did not meet that test.

Through its Indian sovereignty extinguishing provisions, the Settlement Act precludes the creation of Indian country *anywhere* in the State. That has been Rhode Island's jurisdictional paradigm since statehood. Nothing in the 1934 IRA or the 1978 Settlement Act countenances a different result.

I. THE SECRETARY'S 1980 IRA TRUST REGULATIONS ARE ENTITLED TO NO DEFERENCE

The Secretary and his amici place enormous reliance on the 1980 regulations implementing Section 465. They assert that "Congress has not unambiguously resolved" in the IRA whether the Secretary may take land into trust for an Indian tribe "without regard to whether it was recognized and under federal jurisdiction [on] . . . the date of the IRA's enactment." U.S. Br. 11. As a result, they contend, this Court must afford *Chevron* deference to the Secretary's regulations, which they claim extend his trust taking authority to "any Indian tribe . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). Even if Sections 465 and 479 of the IRA were ambiguous (which they are not), the Secretary's reliance on the 1980 trust acquisition regulations is entirely misplaced.[2]

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[2] The Secretary repeatedly refers to trust acquisitions as one of the "special programs and services provided by the United

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First, unlike four other sections of the IRA, Congress never delegated authority to the Secretary to promulgate regulations under either Section 465 or

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States to Indians," as if a trust acquisition were nothing more than a low interest loan or job training program. He claims that the provisions of the IRA authorizing trust acquisitions are ambiguous as to whether tribes recognized after 1934, like the Narragansett, are eligible. As a result, the Secretary argues, he may use his power to "fill the gap" left by Congress and apply IRA's trust acquisition provisions to all federally recognized tribes, regardless of the date of recognition. U.S. Br. 28. While this methodology might suffice to interpret a generic act governing low interest loans, it cannot be used to interpret one that divests a state of its jurisdiction and sovereignty.

Adopting the Secretary's position would more than double the number of tribes eligible for jurisdiction stripping trust under the 1934 Act (from just over 250 to more than 600). The resulting divestiture of state sovereignty over land and the unprecedented intrusion into traditional state authority requires a "clear and manifest" statement from Congress authorizing the Secretary's interpretation. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (where an agency's expansive interpretation would result in significant impingement on state and local governments' traditional and primary power over land and water use, the Court expects a "clear and manifest" statement from Congress to that effect); *see also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court will require "a clear indication that Congress intended that result," especially where the administrative interpretation permits a federal encroachment on traditional state powers). The Secretary's claim of ambiguity is a concession that no such "clear and manifest" statement in the IRA exists to authorize the divestiture of a state's sovereignty in favor of a tribe, like the Narragansett, that was not federally recognized and under federal jurisdiction in 1934.

Section 479. Second, the regulations themselves do not resolve any statutory ambiguity in favor of permitting trust acquisitions for federally recognized tribes, regardless of status in 1934. They define "Tribe" and "Individual Indian" and refer back to the eligibility provisions of the IRA itself (or other act authorizing trust), which includes Section 479's definition of "Indian." Third, the position the Secretary takes–in this case – that the regulations somehow interpret the IRA as having no temporal limitation – is belied by his clear and consistent contrary position in departmental circulars and opinions and by administrative action and inaction from the date of passage of the IRA through the commencement of this case. For these reasons, the regulations cannot be afforded substantial deference under *Chevron,* nor are they even entitled to lesser *Skidmore* deference as a "persuasive" statement of the Secretary's interpretation.

A. Congress has not Authorized the Secretary to Promulgate Regulations for Section 465 or 479 of the IRA

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *Chevron* deference "is warranted *only* 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that

authority.'" *Gonzales v. Oregon,* 546 U.S. 243, 255-56 (2006) (emphasis added) *quoting United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001). *Chevron* deference will not be triggered merely because Congress has chosen to authorize an agency to promulgate regulations under other, unrelated, provisions of a statute. Indeed, the inclusion of regulatory authority by Congress in certain sections of a statute indicates that Congress intended to deny such authority over sections where the authority to promulgate regulations is excluded. *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 452 (2002) (When "Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also Gonzales,* 546 U.S. at 258-59 (declining to find that congressional authorization for agency rulemaking pursuant to certain enumerated sections of the Controlled Substances Act extended to all provisions of the CSA).

Congress did not delegate rulemaking authority to the Secretary for all provisions of the IRA. Instead, it limited the Secretary's rulemaking authority to only four of the IRA's nineteen sections: 25 U.S.C. § 463e (permitting the Secretary to promulgate "such rules and regulations as he may prescribe" to effect certain land consolidations); 25 U.S.C. § 466 (directing the Secretary to "make rules and regulations for the operation and management of Indian forestry units"); 25 U.S.C. § 470 (authorizing the Secretary to

establish a revolving fund "under such rules and regulations as he may prescribe"); 25 U.S.C. § 472 (directing the Secretary to "establish standards of health, age, character, experience, knowledge and ability" for appointment to positions in the Indian Office). Notably absent from this list is any provision authorizing the Secretary to promulgate rules and regulations pursuant to Sections 465 or 479 of the IRA. The omission of rulemaking authority for trust acquisitions under the IRA contrasts sharply with Congress' express delegation of such authority under these other sections of the IRA. The disparate inclusion and exclusion is a clear indication that Congress did not intend for the Secretary to promulgate the trust acquisition regulations upon which he now heavily relies.

This may explain why the Secretary steers clear of any assertion that the IRA is the source of his authority to promulgate trust acquisition regulations. Instead, he relies on 25 U.S.C. § 9, a general delegation of ancient vintage that confers upon the "President" the authority to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." U.S. Br. 28. The Secretary's argument is, presumably, that the general delegation in 25 U.S.C. § 9 is sufficient to authorize the Secretary to promulgate regulations pursuant to particular statutory provisions even where, as in the IRA, Congress is presumed to have excluded such rulemaking authority. This

general delegation is, however, a slender reed upon which to hang the Secretary's power to divest Rhode Island of its sovereignty; and the passage of time and the sweep of history have made 25 U.S.C. § 9 an unreliable source of rulemaking authority for the Secretary.

Enacted in 1834, 25 U.S.C. § 9 is a relic from a period when relations with Indian tribes were governed primarily by the President, through the Department of War, and not by the Congress. Its broad delegation to the President was consistent with America's then-existing relationship with Indian tribes as sovereign nations with whom the President had plenary power to wage war or, through treaties and agreements, make peace. The general delegation contained in 25 U.S.C. § 9 was also "in keeping with a policy of almost total tribal self-government prevailing when [25 U.S.C. § 9] was passed." *Organized Village of Kake v. Egan,* 369 U.S. 60, 63 (1962) (25 U.S.C. § 9 provides no support for issuance by the Secretary of fish trap regulations permitting tribal fishing in contravention of state law).

By the time of the passage of the IRA – a full 100 years later – the primary focus of Indian policymaking had shifted from the President to the Congress,[3]

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[3] Felix S. Cohen, Handbook of Federal Indian Law § 1.04 at 76-77 (N.J. Newton et al. eds. 2005) (discussing Congress' 1871 termination of the President's ability to make treaties with Indian tribes and 1919 termination of the President's power create Indian reservations by proclamation).

relations with Indians were no longer viewed through a military lens and tribes ceased to be regarded as independent sovereign nations with whom relations were structured through presidential proclamations and treaties. As a result, congressional acts like the IRA governing relations with Indians passed since the end of the treaty era depend on *specific* congressional authorization for agency rulemaking rather than the general authorization to the President contained in 25 U.S.C. § 9.

"It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), a canon which is particularly pertinent where, as here, the general delegation of rulemaking authority is merely a vestige of a prior legal regime. *See id.* at 385 (declining to apply a general "saving" clause from the Federal Aviation Act of 1958 because it was "a relic of the pre-[Airline Deregulation Act]/no pre-emption regime."). The general delegation in 25 U.S.C. § 9 cannot supercede the more recent and specific scheme set forth by Congress in the IRA – one that expressly authorizes rulemaking authority for selected provisions while withholding (and thereby prohibiting) rulemaking authority for others, including Sections 465 and 479. To do so would render Congress' specific authorization for secretarial rulemaking in four discrete sections of the IRA mere surplusage. It would do the same for the plethora of rulemaking authorizations

contained in the 46 other acts that are codified in Title 25 of the United States Code.

B. The 1980 Regulations Provide no Support for the Secretary's New Interpretation of the IRA as Including "All Tribes"

Regardless of whether the 1980 trust acquisition regulations were authorized by Congress, *Chevron* deference is still not due to the Secretary's current position that the IRA's trust acquisition regulations apply to all recognized tribes. That is because the regulations do not disavow the IRA's temporal limitation and because the Secretary's own contemporaneous and consistent interpretation of these regulations specifically embrace the limitation.

1. The regulations do not interpret the IRA to avoid the "recognized [in 1934] tribe" test

The Secretary boldly proclaims that the 1980 trust regulations governing his authority to take land into trust for Indian tribes under Section 465 "extend to any Indian tribe that is recognized as eligible for Indian programs, with no limitation based on the tribe's status in 1934." U.S. Br. 10. The regulations, however, do no such thing – and the Secretary's own opinion at the time of the regulation and later confirms this. The Secretary points to 25 C.F.R. 151.2(b), which defines "Tribe" to mean "any Indian tribe * * *

which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." U.S. Br. 28. The regulation further defines "Individual Indian" to mean "any person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). While the Secretary correctly points out that "[n]either definition is tied to recognition status in 1934," U.S. Br. 28, nowhere do the regulations attempt to define or redefine the term "Indian" – which the IRA defines, as relevant here, as all persons of Indian descent "who are members of any recognized Indian tribe now under federal jurisdiction."

Most importantly, the Secretary ignores the very next section, 25 C.F.R. 151.3, which requires that: "Land not held in trust or restricted status may only be acquired for an Individual Indian or a tribe in trust status *when such acquisition is authorized by an act of Congress*" (emphasis added); and subsection (a) of part 151.3 only permits the Secretary to acquire land in trust for tribes "[s]ubject to the *provisions* contained in the acts of Congress which authorize land acquisitions." 25 C.F.R. 151.3(a) (emphasis added). Thus, the regulations merely refer back to the eligibility provisions of the IRA itself, without any attempt to redefine "Indian." Fairly read, these regulations do not purport to change or interpret the definition of Indian contained in the IRA – and the regulations certainly are not "flatly inconsistent" (U.S. Br. 29 n.4) with the temporal limitation.

Indeed, that the regulations leave untouched the IRA's temporal limitation has been confirmed by the Secretary on at least two occasions prior to the commencement of this litigation. On October 1, 1980, just two weeks after the regulations had been published in their final form, the Secretary undertook a detailed analysis of the very question presented here – whether the IRA requires an Indian tribe to have been under federal jurisdiction in 1934 to receive its benefits. In considering whether an Indian tribe is eligible for federal trust acquisitions under Section 465, the Secretary stated that "the definitions of 'Indian' and 'tribe' must be read together," and that to meet Section 479's "recognized tribe now under Federal jurisdiction" test in the definition of Indian, "the United States [must have] had a continuous course of dealing or some legal obligation in 1934." Memorandum from the Associate Solicitor dated October 1, 1980 at 2.[4] While the Secretary now complains that his 1980 opinion does not mention the regulations, U.S. Br. 29 n.4, their marked absence shows that the Secretary did not view the regulations as redefining or interpreting the definition of Indian in Section 479 to exclude the temporal limitation.

Fourteen years later, in 1994, the Secretary once again opined that "Section [479] of the IRA defined

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[4] This opinion was one of four policy statements lodged with the Court by the Solicitor General on August 21, 2008 after the submission of the opening briefs of Petitioners. The other three are dated 1936, 1976 and 1994 and are discussed *infra*.

'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction' and their descendants who then were residing on any Indian reservation, but also 'all other persons of one-half or more Indian blood.'"[5] Letter from the Acting Assistant Secretary to George Miller, dated January 14, 1994 at 3 (bracketed date in original). In sum, both the plain language of the regulations as well as the Secretary's own interpretation of them until this case, reveal that the Secretary does not interpret the IRA as authorizing trust for all tribes regardless of their status in 1934.[6]

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[5] The Secretary notes that this interpretation of Section 479 resembles this Court's own statement of the temporal limitation set forth in *United States v. John*, 437 U.S. 634, 650 (1978). In fact, the cited language is a *direct* quote from *John* replete with the "[1934]" insertion. While the Secretary here pooh poohs *John* as containing a "glancing reference" to the issue at hand, U.S. Br. 25, in 1994 the Secretary viewed it as controlling.

[6] Because these historic Department documents were never disclosed below, the First Circuit was incorrectly led to believe that "it is not seriously disputed that the Secretary has never *rejected* an application to take land into trust for a federally recognized tribe on the ground that the tribe was not recognized and under federal jurisdiction in 1934." Pet. App. 32. While the Secretary's brief cites that quote here, U.S. Br. 33, his October 27, 1976 response to the Stillaguamish Tribe puts that myth to rest. The Secretary *rejected* a request to, *inter alia*, take into trust certain fee lands on the ground that the tribe "was not administratively recognized on the date of that act, (June 18, 1934)." Letter from Acting Secretary to David Getches at 8. While the Stillaguamish decision was reversed by the Secretary four years later, it was on the basis that the Tribe possessed federal treaty rights predating the IRA, showing that "some type

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2. The Secretary has consistently rejected the interpretation of Sections 465 and 479 he proffers in this case

Even though the Secretary's trust acquisition regulations have no claim to judicial deference under *Chevron*, the Secretary's interpretation of Sections 465 and 479 could, nevertheless, still be eligible for respect "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead,* 533 U.S. at 228 *quoting Skidmore v. Swift & Co.,* 323 U.S. 134, 139-140 (1944). The Secretary's new interpretation falls short of meriting even such lesser deference.

In its opening brief, the Town showed that the consistent position of the Secretary, from Commissioner Collier and Assistant Cohen at the time of passage of the 1934 Act to present has been the same as that of Petitioners. Since then, the Solicitor has placed into the record four official Department opinions analyzing the very question presented to this Court – all agree with Petitioners' position that the words "now under federal jurisdiction" contained in Section 479 of the IRA mean at the time of passage of the Act, and not later at the time of recognition.

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of obligation or extension of services to a tribe must have existed in 1934," thereby meeting the "recognized [in 1934] tribe now under federal jurisdiction" requirement (date in bracket added).

These internal memoranda and letters demonstrate that from soon after passage of the Act in 1934 through 1994, the Secretary's interpretation of the trust acquisition provisions of the IRA – consistent with its plain language – was that only Indian tribes that were federally recognized and under federal jurisdiction at the time of the passage of the IRA were eligible to have land taken into trust. These opinions show what Petitioners have been arguing all along – namely, that the position of the Secretary in this case is directly contrary to the actions and interpretation of the Secretary since passage of the Act in 1934.[7]

Three of the documents – the October 27, 1976 letter, the October 1, 1980 Memorandum and the January 14, 1994 Memorandum – have been discussed above. The fourth from Commissioner John Collier is particularly instructive. Collier, of course, was the Commissioner of Indian Affairs at the time of passage of the IRA, its principal architect and the drafter of the very provision in Section 479 at issue in this case. On March 7, 1936, the Commissioner

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[7] While the Secretary now cites a few early Solicitor opinions as "support for the Secretary's regulatory definition," U.S. Br. 32, in 1980 he viewed the prior Solicitor opinions and others as consistent with his then legal position that a tribe's relationship with the federal government "must have existed in 1934" for trust taking to be authorized, and not contrary to the just issued regulations. *See* October 1, 1980 Solicitor Memorandum at 6 (citing Solicitor opinions from 1935, 1936, 1937, 1938, 1944 and 1971). Moreover, the Secretary does not and cannot claim that any of the tribes discussed in the Solicitor Opinions on which he relies were not 1934 Act tribes.

drafted a Circular concerning precisely which Indians and Indian tribes were entitled for inclusion in the IRA. His interpretation of Section 479 is identical to that of Petitioners in this case. The Secretary interpreted Section 479's language that the term "Indian . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction" to unambiguously include "all persons of Indian descent who are members of any recognized tribe that was under federal jurisdiction *at the date of the Act*." Circular at 1 (emphasis added).[8]

These memoranda demonstrate that as soon as the IRA was passed and for at least the first 60 years thereafter, the Secretary interpreted his trust acquisition authority as applicable only to tribes that were federally recognized and under federal jurisdiction in 1934. An agency's contemporaneous construction of a statute it is charged with administering carries persuasive weight. Later conflicting interpretations are entitled to less weight. *Watt v. Alaska,* 451 U.S. 259, 272-73 (1981) ("The Department's current interpretation, being in conflict with its initial position is entitled to considerably less deference").

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[8] It is thus hardly surprising that a year after the Circular, the Secretary denied assistance to the Narragansetts on the ground that "the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs." Town Br. 31-32; J.A. 20.

In sum, the position taken by the Secretary in this case is wholly unsupported by any regulation, rulings, prior opinions, or administrative practice[9] and is, thus, not entitled to any deference. *See Bowen*, 488 U.S. at 212 ("We have never applied [*Chevron*

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[9] The Secretary comes up with only four tribes administratively recognized after 1934 for whom he has taken land into trust without a special act of Congress authorizing the conversion: the Narragansett (whose lands he holds in restricted trust), the Tunica-Biloxi, the Sault Ste. Marie Tribe of the Ottawa and Chippewa Indians and the Grand Traverse Band of the Chippewa (GTB). U.S. Br. 33-34. As demonstrated by Petitioners below, however, both the Sault Ste. Marie and the GTB were federally recognized and under federal jurisdiction in 1934 by virtue of treaties with the United States and, were, thus eligible for trust acquisitions under the IRA. *See* Post En Banc Oral Argument Br. of State Appellants, February 27, 2007 at 20-21. Thus, the Tunica-Biloxi are the *only* tribe for whom the Secretary has taken land into unrestricted trust in violation of the temporal limitation of Section 479. *But see, supra*, note 6 (Secretary correctly applied the IRA's temporal limitation to the Stillaguamish Tribe).

While the Secretary, in 1988, took the Settlement Lands into restricted trust only, the Town nonetheless acknowledges that the conversion was not authorized by the IRA and should not have occurred. The mistake, however, did not create Indian country, it did not revive aboriginal title in the Tribe or permit the Tribe to assert claims of territorial sovereignty over the Settlement Lands and it did not oust the State or Town of their jurisdiction over land within their borders. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) (en banc) (explaining that even after the transfer of the Settlement Lands to the Secretary in trust, the Settlement Act "ensures that the State may demand the Tribe's compliance with state laws of general application" and "that the State may use its entire armamentarium of legal means for redressing compliance"), *cert. denied*, 127 S.Ct. 673 (2006).

deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *Gonzales*, 546 U.S. at 258-75 (rejecting *Chevron* deference where regulation promulgated without authority and further rejecting as "unpersuasive" agency position under *Skidmore*).

II. NO AMENDMENT TO THE IRA REPEALS SECTION 479'S TEMPORAL LIMITATION

The Secretary cites the "Federally Recognized Indian Tribe List Act," 25 U.S.C. § 479a (the "List Act"), a 1994 amendment to Section 476 of the IRA, and the "Indian Land Consolidation Act," 25 U.S.C. § 2202 ("ILCA") as inconsistent with the "recognized [in 1934] tribe" limitation of Section 479 of the IRA.[10] Since none of the amendments modify a single word of the temporal limitation in Section 479, the Secretary urges this Court to find that the amendments repeal it *sub silentio* or by implication. There is nothing in any of the IRA amendments to suggest an implied repeal of the Section 479 temporal limitation. As such, they cannot fairly be read to repeal it.[11]

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[10] While the Secretary uses these acts as further "support" by Congress of his interpretation of Section 479, other amici are straightforward in claiming that these acts trump the 1934 Act's limitation.

[11] The Secretary and amici also cite other congressional acts outside the IRA involving Indians as support for superceding or disregarding the IRA's temporal limitation. While some of these acts do define Indian more broadly than the IRA, none have the

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First, by its express terms the List Act provides a definition of "Indian tribe" only "[f]or purposes of this title," and no other. The Act goes on to define "this Title" as "Section 479a" only. 25 U.S.C. § 479a. Thus, Congress painstakingly insured that its definition of Indian tribe in Section 479a, for the limited purpose of having one comprehensive list of tribes eligible for certain benefits, is not to be imported to Section 479. That Section 479a was specifically confined – and Section 479 unchanged – shows a congressional intent to affirm Section 479's temporal limitation. Otherwise, there would have been no reason to limit Section 479a's definition of Indian tribe to that specific section of the IRA only. The List Act itself does nothing more than require the Secretary to publish annually a list of all then-federally recognized Indian tribes. The List Act disavows any pretense of changing the definition of Indian or tribe contained in the IRA or any of the myriad federal acts providing programs or services to Indians.

Second, the 1994 amendment to Section 476 of the IRA – contained in Section 476(f) and 476(g) – likewise, is of no help to the Secretary. The amendment is to Section 476 of the IRA and not 479. It makes no change whatsoever to the definitional Section 479. Section 476 is entitled: "Organization of

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purpose and effect of creating Indian country and stripping state jurisdiction as does the IRA. Because these acts do not touch the IRA's definition of Indian, they certainly cannot repeal it.

Indian tribes; constitution and bylaws and amendment thereof; special election." It deals with a tribe's ability to constitute a government for its "common welfare" and to "adopt an appropriate constitution and bylaws." 25 U.S.C. § 476(a). The amendment referred to does not apply to any legislation; rather, it prohibits the executive branch from promulgating regulations or making any decision "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized Indian tribes by virtue of their status as Indian tribes." 25 U.S.C. §§ 476(f), (g). It was not the executive branch that established the temporal limitation in Section 479; it was Congress. Moreover, the amendment applies only to executive branch discretion "by virtue of their status as Indian tribes." It says nothing concerning whether the entity *is* an Indian tribe under Section 479 of the IRA.

Third, the Secretary cites the 1983 ILCA as undoing Section 479's temporal limitation. All the ILCA does, however, is allow pre-1934 Act tribes that were eligible, but voted to opt out of the IRA pursuant to Section 478, to vote to come back in – nothing more. That is made entirely clear by the text of 25 U.S.C. § 2202, which states that: "The provisions of section 465 of this title shall apply to all tribes *notwithstanding the provisions of section 478* of this title; *Provided,* That nothing in the section is intended to supercede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of

land for Indians with respect to any specific tribe, reservation, or state(s)." (emphasis added). Section 478 is the only section that is superceded, and what the ILCA does is ensure that any tribe *to which the IRA was originally applicable in 1934* can come under the ILCA even if the tribe opted out of the IRA under Section 478 within a year of its passage. Had the ILCA intended to apply to all Indian tribes "notwithstanding" Section 479's temporal limitation it could have said so, the same way it did with respect to Section 478's opt out provision for IRA eligible tribes.

If a tribe comes under the ILCA (as opposed to the IRA), it may "adopt a land consolidation plan . . . for the purpose of eliminating undivided fractional interest in Indian trust or restricted lands or consolidating its tribal land holdings." 25 U.S.C. § 2203. It is for this purpose only that the ILCA defines a tribe. That is why, contrary to the Secretary's position, Congress refused to apply the ILCA to "all tribes" notwithstanding the temporal limitation in Section 479. In the definition section of the ILCA, Congress limited the definition of "Indian tribe" to include only those tribes for which the United States already holds land in trust,[12] and not "all tribes." 25 U.S.C.

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[12] While NCAI amici (but not the Secretary) claims that this test is met because the Secretary has the Settlement Lands in "trust" for the Tribe, that assertion goes nowhere. NCAI Br. 8 n.4. That is because the "trust" into which the Settlement Lands have been placed is not a true trust. As the Secretary and all amici agree, unrestricted trust creates Indian country, where federal and tribal law largely trump state law. The 1,800 acres

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§ 2201(1). Moreover, rather than repealing the definition of "Indian" contained in Section 479, Congress *expressly reaffirmed* it – "(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479). . . ."

The amendments to the IRA since 1934 do not accomplish an implied repeal. If Congress wished to remove the temporal limitation contained in Section 479, it knew exactly how. It could simply have deleted the word "now" or (as it did in Section 472) added the words "or hereafter" following "now." Since it has done neither, the temporal limitation contained in Section 479 remains intact.

III. THE SECRETARY WRONGLY READS THE SETTLEMENT ACT'S EXTINGUISHMENT PROVISIONS AS ALLOWING CLAIMS OF INDIAN SOVEREIGNTY OVER LAND THROUGHOUT RHODE ISLAND

In contrast to his lengthy and detailed examination of the language of the IRA, the Secretary steers clear of any real scrutiny of the language of the Settlement Act. He claims that there is "simply nothing in the text of the Settlement Act * * * that

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of Settlement Lands are the antithesis of Indian country – they are subject to "civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). Thus, the restricted "trust" here is simply not the type of vehicle to which the ILCA refers for its purpose of creating and consolidating Indian country.

accomplishes * * * a repeal or curtailment" of his trust authority. U.S. Br. 41. On the contrary, since the Settlement Act "expressly provided that the Tribe would have the same right to petition for recognition and services as other groups," the Secretary concludes that the Tribe is eligible to have land taken into trust by the Secretary on its behalf. *Id.* Moreover, the Secretary proclaims that nothing in the Settlement Act prevents land so converted from becoming "Indian country" over which the United States and the Tribe, rather than Rhode Island, would have jurisdiction. U.S. Br. 41-42.

The Secretary's interpretation of the Settlement Act has less to do with a fair reading of that statute than with his repeatedly-expressed "mandate" to treat all federally recognized tribes the same. *See, e.g.* U.S. Br. 37 (reciting that federal agencies are prohibited from promulgating regulations that either enhance or diminish the privileges and immunities available to one federally recognized tribe relative to another). Congress, however, not the Secretary of the Interior, controls the privileges and immunities afforded to federally recognized tribes. Congress frequently enhances, curtails or even eliminates tribal privileges and immunities.[13] When it does, the Secretary must adhere to its directive, even if that

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[13] Indeed, one need only look to the other settlement acts cited by the Secretary to see this principle in action. U.S. Br. 46-51. In each of those settlement acts, Congress placed limits on the traditional reach of Indian territorial sovereignty.

results in disparate treatment among tribes. The Settlement Act contains provisions that limit the traditional "privileges and immunities" of the Narragansett Indian Tribe.

The Secretary and the Tribe all but ignore the Settlement Act's express extinguishment of aboriginal title and they do not respond to the argument that aboriginal title and Indian trust title are essentially the same form of land tenure. Neither the Secretary nor any Indian amici, however, dispute that aboriginal title and trust title are both rights of use and occupancy characterized by a tribe's ability to *exercise sovereign dominion over land* without fee simple ownership of it. Indeed, the resulting jurisdictional and sovereignty ramifications for all of the players in this saga – the United States, the Tribe, the State and the Town – are identical under either land tenure regime. It defies law and logic to conclude that Congress might have so categorically extinguished one form of Indian land tenure only to allow it to be replaced, through agency action, with precisely the same form of Indian land tenure under a different name.

The Secretary and the Tribe claim that decisions of this Court support that position. The Secretary interprets *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005) as blanket authorization "for tribes 'to reestablish sovereign authority over territory.'" U.S. Br. 43. He fails to mention that the Oneida lost their sovereignty over land through

laches and not an act of Congress. That distinction makes all the difference. *See* Town Br. 45-48.

The Tribe additionally cites *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998), as supportive of the Secretary's ability to acquire trust property for the Tribe. Tribe Br. 11, 19. The Secretary there acquired land in trust for the Band under Section 465 of the IRA, even though Congress had previously extinguished the Band's aboriginal title through the General Allotment Act.

Cass County does not, as the Tribe asserts, stand for the proposition that any tribe lacking a "unilateral possessory right" to assert sovereign control over land may, nevertheless, regain such control through the trust process. Tribe Br. at 11. Instead, *Cass County* simply demonstrates that when a tribe loses its land through federal allotment of the 1880's, as the Chippewa did, the resulting extinguishment by Congress of Indian or aboriginal title can only be undone by a subsequent act of Congress. For the Chippewa and other tribes that were federally recognized and under federal jurisdiction in 1934 (and thus, targets of the now-repudiated allotment policy), the IRA *is* that subsequent act of Congress. Tribes whose aboriginal title was specifically extinguished by Congress *after* passage of the IRA, like the Narragansett, cannot rely on the general provisions of the previously-enacted IRA to revive their territorial sovereignty. Without a separate act of Congress that authorizes trust acquisitions or otherwise revives their ability to exercise territorial sovereignty over newly acquired

land, the Secretary is without legal authority to undo the prior extinguishment.

IV. IF TRUST IS ALLOWED, STATE JURISDICTION MUST BE PRESERVED TO HARMONIZE THE IRA WITH THE SETTLEMENT ACT

While the Secretary argues that there is nothing in the Settlement Act that serves to prevent or even curtail his ability under the IRA to take land into unrestricted trust, the Settlement Act's extinguishment provisions must be read to at least limit the Secretary's trust power, by preventing the creation of Indian country in Rhode Island for the first time in its constitutional history. *See Carcieri v. Kempthorne*, Pet. App. 71-81 (Howard, J. and Selya, J. dissenting).

The presumption against repeals by implication can be overcome by an irreconcilable conflict between statutes. If two federal statutes are "repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Pipefitters Local Union No. 526 v. United States*, 407 U.S. 385, 432 (1972). Nor is it necessary for this Court to impliedly repeal a statute in whole. A repeal by implication obtains only to the extent necessary. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy.").

The 1978 Settlement Act's land tenure provisions, which extinguish the Tribe's aboriginal title and rights and interests in land throughout the State, preclude the Tribe from exercising sovereignty over land in Rhode Island. Section 465 of the 1934 Act, on the other hand, permits the establishment of tribal sovereignty over land through trust. These two acts create antithetical jurisdictional and sovereignty regimes. Accordingly, the provisions of the later-enacted Settlement Act that extinguish the Tribe's right to exercise territorial sovereignty and preserve the State and Town exercise of their jurisdiction within their borders are repugnant to Section 465 of the earlier passed IRA. The IRA's trust provisions must, therefore, give way to the extent they conflict with the Settlement Act's extinguishment of Indian territorial sovereignty.

This Court endeavors, to the extent possible, to read antagonistic statutes together in a manner that will minimize the aggregate disruption of congressional intent. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). While the Secretary's proposed taking of the Parcel into unrestricted trust would create prohibited Indian territorial sovereignty in Rhode Island, there is no legal necessity for the Parcel or any other land taken into trust to create Indian sovereignty or divest State jurisdiction. Both the Secretary's ability to take land into trust under the IRA and the Settlement Act's prohibition on the re-creation of Indian sovereignty over land through the establishment of Indian country can be met and the statutes harmonized.

To this end, Petitioners argued below, and the Town suggests again here, that the way to harmonize Section 465 of the IRA (assuming *arguendo* that the IRA applies) with the Settlement Act is to read the two acts together to permit the Secretary to take the Parcel into trust under Section 465 but to require that it be subject to the full application of the State's civil and criminal laws and jurisdiction – the very same "restricted trust" jurisdictional regime that currently exists on the Settlement Lands right across the street. Reading the two statutes to preserve State jurisdiction over the Parcel honors the extinguishment provisions of the Settlement Act while, at the same time, does nothing to offend the IRA.[14]

Indian land was not lost in Rhode Island through allotment. Instead, it was lost through land transfers in alleged violation of the Non-Intercourse Act. The Settlement Act, not the IRA, is the congressionally-mandated remedy for those losses. Harmonizing the IRA with the Settlement Act, however, provides the Tribe with the benefit of both acts without divesting the State of its jurisdiction. The Tribe gets its land in trust, property tax free, and preserves its eligibility for the other benefits of the IRA. To the extent that the IRA seeks to restore Indian lands, that goal is honored by the Settlement Act's grant of 1,800 acres

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[14] The harmonization would also have no impact on the proposed Indian housing. The housing has been permitted and complies with State law and local ordinance. There is no need for the Parcel to be in trust or be converted to Indian country.

to the Tribe. Any trust acquisition, however, must be restricted such that State laws and jurisdiction fully apply. This is the only way to preserve the integrity of the Settlement Act's extinguishment of Indian territorial sovereignty in Rhode Island.

CONCLUSION

The IRA does not include the Narragansett and the Settlement Act does not permit the ouster of the State's laws and jurisdiction in favor of Indian territorial sovereignty. As a result, the Secretary cannot acquire land in unrestricted trust for the Tribe. The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

**Counsel of Record*

AMICUS CURIAE BRIEF

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(10)

No. 07-526

Supreme Court, U.S.
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In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, FLORIDA, ILLINOIS, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

RICHARD BLUMENTHAL
Attorney General of Connecticut
*ROBERT J. DEICHERT
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Ph. (860) 808-5020; FAX (860) 808-5347
**Counsel of Record*

[Additional Appearances On Inside Cover]

TALIS J. COLBERG
Attorney General of Alaska

TROY KING
Attorney General of Alabama

DUSTIN MCDANIEL
Attorney General of Arkansas

BILL MCCOLLUM
Attorney General
of Florida

LISA MADIGAN
Attorney General of Illinois

TOM MILLER
Attorney General of Iowa

STEPHEN N. SIX
Attorney General of Kansas

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

MARTHA COAKLEY
Attorney General
of Massachusetts

JIM HOOD
Attorney General
of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
of Missouri

JON C. BRUNING
Attorney General
of Nebraska

ANNE MILGRAM
Attorney General
of New Jersey

WAYNE STENEHJEM
Attorney General
of North Dakota

NANCY H. ROGERS
Attorney General of Ohio

W.A. DREW EDMONDSON
Attorney General
of Oklahoma

THOMAS W. CORBETT, JR.
Attorney General
of Pennsylvania

LAWRENCE E. LONG
Attorney General
of South Dakota

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Attorney General of Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE FIRST CIRCUIT MISCONSTRUED THE IRA TO GRANT THE SECRETARY AUTHORITY NOT INTENDED BY CONGRESS 4

A. THE TEXT AND THE CONTEXT OF SECTION 479 UNAMBIGUOUSLY LIMIT THE SECRETARY'S AUTHORITY TO TRIBES RECOGNIZED PRIOR TO 1934 . 4

B. THE PLAIN READING OF THE IRA IS CONSISTENT WITH ITS BACKGROUND AND LEGISLATIVE HISTORY 13

C. THE PRINCIPLES UNDERLYING *BRAND X* PRECLUDED THE SECRETARY FROM ADOPTING A READING CONTRARY TO A PRIOR JUDICIAL HOLDING 20

II. THE FIRST CIRCUIT MISCONSTRUED THE SETTLEMENT ACT 24

III. THE FIRST CIRCUIT'S ERRONEOUS DECISION WILL HAVE SUBSTANTIAL NEGATIVE IMPACTS ON STATES NATIONWIDE 30

CONCLUSION 34

LIST OF SETTLEMENT ACTS A1

TABLE OF AUTHORITIES

Cases

Barnhart v. Thomas, 540 U.S. 20 (2003) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4, 8, 20, 23

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 12

Connecticut v. DOI, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) 33

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 15, 16

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 8

Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004) 6, 8

Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) 6

Lamie v. United States Tr., 540 U.S. 526 (2004) ... 19

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 22

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 15

Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23 (D.C. Cir. 2008) 15-16

Montana v. Kennedy, 366 U.S. 308 (1961) ..... passim

Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908 (1st Cir. 1996) 28, 30

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) 26, 27

Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Servs., 545 U.S. 967 (2005) 20-21, 22, 23, 24

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, ___ U.S. ___, 127 S. Ct. 2518 (2007) .. 4, 8

New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007) 6

Sullivan v. Everhart, 494 U.S. 83 (1990) 23

The Cherokee Tobacco, 78 U.S. 616 (1870)..... 12

United States v. John, 437 U.S. 634 (1978)..... 5, 22

United States v. Mitchell, 463 U.S. 206 (1983)..... 16

United States v. State Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) 6, 21, 22, 24

Washington v. Confederated Tribes of the Colville Indian Reserv., 447 U.S. 134 (1980)..... 11

Weedin v. Chin Bow, 274 U.S. 657 (1927)..... 6

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., ___ U.S. __, 127 S. Ct. 1534 (2007) 13, 18, 19

Statutes

25 U.S.C. § 465 ..... 2, 5, 8

25 U.S.C. § 466 16

25 U.S.C. § 468 8

25 U.S.C. § 472 8

25 U.S.C. § 478 10

25 U.S.C. § 479 ..... passim

25 U.S.C. § 1705 25

25 U.S.C. § 1706(a)(3) 25, 31

25 U.S.C. § 1708 31

25 U.S.C. § 1708(a) 25

25 U.S.C. § 1712 25

Regulations & Federal Register

25 C.F.R. § 1.4(a) 1

25 C.F.R. § 151.9 29

25 C.F.R. § 151.10 29

Dep't of the Interior, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 73 F.R. 18553 (April 4, 2008) 32

Legislative Materials

73 P.L. 383, § 18; 48 Stat. 984 (June 18, 1934) 10

78 Cong. Rec., at 11726 16

H.R. Rep. 95-1453, at 12 29

H.R. Rep. 95-395, p. 13 26

H.R. Rep. 95-395, p. 6 26

H.R. Rep. No. 131, 73d Cong., 1st Sess., p.2 9

H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) 15

Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 35 (1934 17

Joint Committee Hearing on S. 3153 and H.R. 12860, 121 (June 20, 1978) 17

Joint Committee Hearing, 112 (Statement of Eric Thomas, Tribal Secretary, Naragansett Tribe). 26

S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934) 15

S. Rep. No. 865, 73d Cong., 2d Sess., p.1 (1934)..... 9

Other Authorities

Chris Patsilelis, *The storm that smashed New England*, Houston Chron., Oct. 5, 2003.....32

U.S. Indian Serv., *Ten Years of Tribal Government Under I.R.A.*, 2-3 (1947).....32

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States (the "*Amici* States"),[1] through their Attorneys General, submit this brief in support of the brief filed by the State of Rhode Island.

The *Amici* States have a vital interest in this case because the First Circuit's decision misinterprets two federal statutes, the Indian Reorganization Act of 1934 ("the IRA")—which grants the Secretary of the Interior ("the Secretary") authority to take land within any State into trust "for Indians"—and the Rhode Island Indian Claims Settlement Act ("the Settlement Act"), which contains provisions mirrored in Indian land claim settlement acts nationwide. Land taken into trust for Indians by the Secretary is removed from state authority in several significant respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the States' ability to exercise their sovereign powers to protect the public on the trust land. 25 C.F.R. § 1.4(a). Thus, the result of the Secretary's taking land into trust is the creation of an area largely controlled by a competing sovereign within a state's borders without its consent, contrary to core principles of federalism.

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[1] The *Amici* States are: Alabama, Alaska, Arkansas, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas and Utah.

The First Circuit's erroneous interpretation of federal law has resulted in an expansion of land taken into trust and thereby removed from the States' jurisdiction. The Secretary has already taken into trust several million acres nationwide pursuant to the IRA under § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. The *Amici* States have a compelling sovereign interest in having this Court define the proper application of the IRA, particularly in conjunction with settlement acts.

SUMMARY OF THE ARGUMENT

The Secretary's power to take land into trust pursuant to the IRA enables him to administratively create areas within a state's borders at the behest of an Indian tribe that are, in many key respects, outside that state's jurisdiction. Consequently, the exercise of that power has substantial, and permanent, consequences for the impacted state and local communities. Indeed, that power gives the Secretary the capacity to change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes, some of which have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities.

Given the repercussions of the power to take land into trust and the Secretary's guardianship relationship with the tribes on whose behalf he exercises it, it is incumbent on the courts to

vigilantly enforce the limits Congress has placed on the Secretary's power in order to maintain the proper separation of powers. The First Circuit did precisely the opposite. Although the IRA unambiguously allows the Secretary to take land into trust only on behalf of tribes that were recognized and under federal jurisdiction in 1934, the First Circuit strained to inject ambiguity into the statute and then deferred to the Secretary's construction, which is directly contradicted by both the text and context of the IRA as informed by this Court's decisions and by the IRA's legislative history. In so doing, the First Circuit abdicated its judicial function and deferred to the Secretary's vast expansion of his trust power at the expense of the States, in violation of the limits Congress has so clearly imposed.

The First Circuit exacerbated its error by interpreting the Rhode Island Settlement Act—which reflects the clear intent of Congress and the parties to grant the Narragansett Tribe a substantial land base in exchange for submitting to state jurisdiction—to permit the Tribe to enlist the Secretary to take additional land outside the settlement area into trust, thereby removing it from state jurisdiction and allowing the Tribe to build a housing complex without obtaining any of the approvals intended to protect public safety. This leads to the absurd result that Rhode Island has more power to protect the fish on the Tribe's settlement lands than it does to protect the humans on the trust lands, even though Rhode Island explicitly protected its jurisdiction through the hard-fought negotiations that led to the Settlement Act. As Judge Howard and Judge Selya argued in

their dissents, neither Congress nor the parties intended such a bizarre result.

ARGUMENT

I. THE FIRST CIRCUIT MISCONSTRUED THE IRA TO GRANT THE SECRETARY AUTHORITY NOT INTENDED BY CONGRESS

A. THE TEXT AND THE CONTEXT OF SECTION 479 UNAMBIGUOUSLY LIMIT THE SECRETARY'S AUTHORITY TO TRIBES RECOGNIZED PRIOR TO 1934

The first question presented—whether the First Circuit's deference to the Secretary's interpretation of the IRA to allow him to take land into trust on behalf of the newly recognized Narragansett Tribe was proper—involves a straightforward application of this Court's *Chevron* framework. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Thus, an agency's interpretation of a statute is entitled to deference "only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S. Ct. 2518, 2534 (2007) (quoting *Chevron*, 467 U.S. at 843).

The precise question at issue in this case is whether Congress in the IRA intended to allow the Secretary to take land into trust on behalf of Indian tribes, like the Naragansett Tribe, that were not recognized and under federal jurisdiction in 1934, when the IRA was enacted. Congress addressed that precise temporal question in the IRA's text and unambiguously provided that the Secretary's authority to take land into trust is limited to pre-1934 tribes. The IRA allows the Secretary to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defines "Indian" to "include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction.*" 25 U.S.C. § 479 (emphasis added). Congress' use of the word "now" unambiguously expresses its intent to limit the Secretary's trust authority to tribes that were recognized and under federal jurisdiction *at the time of the IRA's enactment in 1934.*

Prior to the decision below, every circuit court to address the issue—as well as this Court—agreed with the *Amici* States' reading of the IRA. This Court noted that "[t]he 1934 Act defined 'Indians' as [*inter alia*] . . . 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *United States v. John*, 437 U.S. 634, 650 (1978) (latter bracketed material in original) (quoting 25 U.S.C. § 479). Even assuming *arguendo* that this language was not holding, it demonstrates that the IRA unambiguously applies only to 1934 tribes.

The circuit courts to address the issue stated their views equally clearly. The Ninth Circuit concluded that the IRA "by its terms" does not apply to tribes not under federal jurisdiction in 1934[2] and the Fifth Circuit held that the statute "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original) (quotation marks omitted). The consensus among the courts to address the meaning of the term "now" in Section 479 "rule[s] out any serious claim of ambiguity." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004) *see also New York v. EPA*, 443 F.3d 880, 886 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

Apart from the IRA, this Court has repeatedly held in analogous circumstances—both before and after the passage of the IRA—that when Congress uses the word "now" in a statute, it intends to incorporate a temporal limitation as of the date of enactment. *See, e.g.*, *Montana v. Kennedy*, 366 U.S. 308, 311 (1961); *see also Weedin v. Chin Bow*, 274 U.S. 657 (1927).

Montana—involving the interpretation of statutes governing citizenship—is instructive. There, the Seventh Circuit held that "a fifty-five year old man who has resided in this country since he was an infant" could not validly claim

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[2] *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004).

citizenship under those statutes and could therefore be deported. *Montana*, 366 U.S. at 310. This Court "granted certiorari to review that conclusion in view of the apparent harshness of the result entailed." *Id.* at 309. It nonetheless held that it was bound by the clear language of the statutes and affirmed the decision below. *Id.*

There, as here, the outcome of one of the petitioner's claims hinged on the meaning of the term "now" in the statute. The citizenship statute applied to "children of persons who *now* are, or have been citizens of the United States." *Id.* at 310 (emphasis added). This Court held that, by its terms, the statute encompassed only individuals who were citizens "*on* . . . the effective date of the . . . statute" and that the statute "had no prospective application." *Id.* at 311. Therefore, the petitioner's claims had to fail, notwithstanding the acknowledged harshness of the result. This interpretation of the effect of the statutory term "now" was consistent with the view of commentators and this Court's decisions issued prior to the IRA's enactment. *Id.* at 312. Thus, this Court has consistently made clear that "now", as used in a statute, unambiguously means at the time of enactment, and the First Circuit erred in finding ambiguity in the IRA's use of the term.[3]

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[3] The First Circuit did not point to a single decision interpreting "now" in the IRA, or a similar statute, to mean anything other than at the time of enactment, and acknowledged that *Montana*—which addressed an analogous circumstance—supported the conclusion that "now" meant as of 1934. *Pet. App.*, 19. It nonetheless concluded that

An examination of the context provided by the IRA's other provisions further evidences Congress' unambiguous intent. *See, e.g., Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534 (noting that "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Those provisions demonstrate that the 1934 Congress carefully distinguished between its use of "now"—intended to mean at the time of enactment—and other phrases intended to "operat[e] . . . at the moment the Secretary invokes it." *Pet. App.*, 20.

For example, Section 465 refers to "measures *now* pending in Congress," which, of course, means measures pending at the time of the IRA's enactment. (emphasis added). By contrast, Section 468 encompasses both past and future events by referencing land outside the boundaries "of any

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"now" was ambiguous based on a 1990 Sixth Circuit case involving disability benefits and two state court cases, each of which post-date the IRA's enactment by at least 45 years. *Pet. App.*, 20. In light of the overwhelming evidence of the 1934 Congress' intent discussed *infra*, those decisions did not and could not establish ambiguity. *Cf. Cline*, 540 U.S. at 594 n.6 (finding overwhelming weight of authority to favor finding a lack of ambiguity, even though one court had reached the opposite conclusion on the same issue).

Indian reservation *now existing or established hereafter*." (emphasis added). Section 472 further illustrates the point, referring to "positions maintained, *now or hereafter*, by the Indian Office." (emphasis added). Thus, viewing Section 479 in context strongly supports the conclusion that by using "now", Congress intended to limit the Act's application to tribes recognized and under federal jurisdiction in 1934. Had Congress intended the First Circuit's reading—that land can be taken into trust on behalf of tribes recognized at any time—Congress would have used "now or hereafter," or similar language, or simply deleted the word "now" altogether.

It is difficult to see how Congress could have more definitively drawn this distinction. Indeed, less than one month before it enacted the IRA, the same Congress amended the 1874 statute at issue in *Montana*—which granted citizenship to "children of persons who *now* are, or have been citizens of the United States" and thus applied only to individuals who were citizens "*on* . . . the effective date of the . . . statute"—to "finally grant[] citizenship rights to the foreign-born children of citizen mothers." *Montana*, 366 U.S. at 310-312 (first emphasis added; second in original). In so doing, Congress "not only specifically made the provision prospective, but further made clear its view that this was a reversal of prior law." *Id.* at 312 (citing H.R. Rep. No. 131, 73d Cong., 1st Sess., p.2 and S. Rep. No. 865, 73d Cong., 2d Sess., p.1). Thus, there can be no doubt that the 1934 Congress intended "now" in Section 479 to mean at the time of enactment.

The First Circuit's response to the clear textual and contextual expressions of congressional intent was to conclude that because Congress used specific dates in other IRA provisions, its use of "now" in Section 479 was somehow ambiguous and could reasonably be read to mean "now or hereafter." *Pet. App.*, 20-21. That conclusion is premised on two obvious errors. The first was to find ambiguity because Section 479 "specifies the date of June 1, 1934 as the relevant date for determining eligibility [under the IRA] based on 'residing within the present boundaries of any Indian reservation.'" *Pet. App.*, 20. There simply is no inconsistency in Congress' use of "now" to refer to the IRA's effective date—June 18, 1934—and Congress' use of "June 1, 1934", a different set date, to measure certain individuals' status.

The First Circuit's second error with regard to this argument was to find that Section 18 of the IRA—codified as 25 U.S.C. § 478—"requir[ed] elections [under the IRA] to be held 'within one year after June 18, 1934,'" and to use that to support its conclusion that if Congress had intended "now" to mean at the time of enactment in Section 479, Congress would have used "June 18, 1934" instead. *Pet. App.*, 21 (quoting 25 U.S.C. § 478). Even if the use of a specific date in that section could somehow make "now" ambiguous (which it could not), the text of that section of the IRA as Congress passed it did not reference a specific date at all. Rather, it provided, in pertinent part, that "[i]t shall be the duty of the Secretary of the Interior, *within one year after the passage and approval of this Act*, to call such an

election . . . ." 73 P.L. 383, § 18; 48 Stat. 984, 988 (June 18, 1934) (emphasis added).

Thus, Section 18 of the IRA actually undermines the First Circuit's conclusion in two significant respects. The first is that it shows that Congress avoided using specific dates when referencing the IRA's effective date, presumably because the effective date could change during the process of enactment. *See, e.g.*, *Montana*, 366 U.S. at 310 (using "now"—rather than specific date—to refer to date of enactment). The second is that if Congress intended "now" to mean "whenever," it presumably would have allowed tribes to opt out of the IRA within some time period after they become eligible, rather than requiring all tribes—even if they were not recognized or under federal jurisdiction in 1934—to opt out of the IRA by June 1935.

The First Circuit could not dispute the logic of that second proposition and the additional contextual support it provides for the States' argument, but brushed it aside by speculating that "it is difficult to see why any tribe would opt out of a statute designed to benefit it." *Pet. App.*, 28. Again, the lower court's reasoning was premised on clear legal and factual errors. In reality, a number of tribes did decide to opt out of the IRA in 1935, and the First Circuit was wrong to assume the provision was superfluous. *See, e.g.*, *Washington v. Confederated Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 143 n.11 (1980) (noting that the Lummi and Colville Tribes "voted in 1935 not to come under" the IRA). The court's strained reading of the text would lead to the absurd result that all

post-1934 tribes will be forced to adopt the IRA even if they would choose not to do so. It is difficult to see how forcing post-1934 tribes to accept a federal scheme other tribes have decided to reject would further tribal sovereignty.

Ultimately, the IRA's language establishing "now" as the date of enactment "is as clear and explicit as could be employed." *The Cherokee Tobacco*, 78 U.S. 616, 620 (1870). There is simply nothing in either the text or the context of Section 479 to support the Secretary's reading of "now" to mean whenever in the future the Secretary chooses to act, and the First Circuit erred by stretching to create ambiguity where none exists to accommodate the Secretary's incorrect reading. As this Court has held:

> There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. Further discussion of the subject is unnecessary. . . . The effort may confuse and obscure but cannot enlighten. It never strengthens the pre-existing conviction.

Id.; *cf. Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (holding statute to be unambiguous despite erroneous statutory language that arguably supported tribe's reading).

B. THE PLAIN READING OF THE IRA IS CONSISTENT WITH ITS BACKGROUND AND LEGISLATIVE HISTORY

Given the clarity with which both the text and the context of Section 479 establish that "now" means at the time of enactment, the First Circuit erred by looking to the IRA's legislative history and the circumstances surrounding its enactment. *See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, ___ U.S. __, 127 S. Ct. 1534 (2007). Further, even if an examination of the background and legislative history of the IRA were appropriate in this case, that background and history does not support the Secretary's reading and certainly cannot overcome the Act's clear text.

The legislative history of the IRA's "now" limitation is consistent with Congress' intent to limit the IRA's application to 1934 tribes. Specifically, Representative Howard and Commissioner of Indian Affairs Collier—two key players in the IRA's enactment—made statements that directly indicate that the IRA was intended to apply only to tribes recognized as of 1934. Representative Howard stated that Section 479 "'defines the persons who shall be classified as Indian. In essence, it recognizes the *status quo of present reservation Indians* and further includes all other persons of one-fourth Indian blood.'" *Pet. App.*, 26 (emphasis added). On its face, that reference to the *status quo* of reservation Indians clearly indicates that the IRA applies only to tribes

recognized and under federal jurisdiction in 1934, consistent with its plain text.

Commissioner Collier spoke even more clearly on this issue. An early draft of the IRA defined "Indian" to *inter alia* "'include all persons of Indian descent who are members of any recognized Indian tribe.'" *Pet. App.*, 23-25. Senators expressed concern about whether that definition would sufficiently ensure *bona fide* status and, in response, Commissioner Collier proposed the "now" limitation, which Congress ultimately adopted. *Id.*

The First Circuit took that evidence—which is entirely consistent with the IRA's plain text and purposes—and twisted it into a source of ambiguity. Specifically, it concluded that "although none of the parties have raised this, it may well be that the phrase 'now under federal jurisdiction,' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" *Pet. App.*, 25. This speculation was not only improper, it also conflicts with both common sense and the rules of grammar. By its terms, the statute applies to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It strains credulity to claim that the "now" was intended to modify "members" rather than "tribe." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reversing statutory reading contrary to "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). The weakness of this interpretation is presumably why the federal

respondents did not make the argument below and why the First Circuit was forced to create it out of whole cloth.

Reading the IRA to apply only to tribes recognized and under federal jurisdiction in 1934 is not only consistent with the legislative history directly related to the "now" limitation, it is also entirely consistent with the Act's broader purposes and history. The IRA was intended to help remediate the impact on then-recognized tribes of pre-1934 federal policies and bureaucratic failings. Specifically, this Court has recognized that "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative *destroyed by a century of oppression and paternalism.*'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (emphasis added) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) and citing S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934)).

One of the primary aspects of that past oppression and paternalism was the federal government's policy of allotment, which began with the passage of the General Allotment Act of 1887 and lasted until 1934, when the IRA was enacted. During the allotment period, two-thirds of former Indian lands were acquired by non-Indians. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA brought "'an abrupt end'" to that allotment policy and reflected a "broad effort to promote economic development among American Indians, *with a special emphasis on preventing and*

recouping losses of land caused by previous federal policies." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008) (*per curiam*) (emphasis added) (quoting *County of Yakima*, 402 U.S. at 255).[4]

Although seeking to remedy losses of land by tribes that had been subjected to the federal government's discontinued allotment policy was one of the IRA's key purposes, the Act also sought to remediate the consequences of "deficiencies in the Interior Department's performance of its responsibilities" to protect the assets of recognized tribes under federal jurisdiction prior to 1934. *United States v. Mitchell*, 463 U.S. 206, 220 (1983). For example, the Department of Interior's failure to adequately protect Indian timber led Congress to enact Section 6 of the IRA—codified at 25 U.S.C. § 466—which "expressly directed that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'" *Id.* at 221 (quoting 25 U.S.C. § 466).

In the debates concerning the IRA, Representative Howard characterized the "relationship between the Indians and the government as a 'sacred trust,'" and attributed the "'*present plight* of the average Indian'" to "'[the] failure of their governmental guardian to conserve the Indians' land and assets and the consequent

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[4] To the extent the IRA's purpose was to remediate losses caused by the allotment policy, it also counsels against applying the Act to tribes in Rhode Island and other colonial states, which were not subject to the federal allotment policies.

loss of income or earning power.'" *Id.* (emphasis added) (quoting 78 Cong. Rec., at 11726 (remarks of Rep. Howard)). Commissioner Collier, a principal author of the IRA, echoed those sentiments, imploring Congress to "'stop the slaughtering of Indian timber lands.'" *Id.* at 221 n.21 (quoting Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 35 (1934)).

Those dual purposes—to remedy the impact of allotment on existing Indian lands and Interior Department deficiencies on existing Indian assets—are entirely consistent with reading the IRA as it was written: that is, to apply only to tribes recognized and under federal jurisdiction in 1934. It was eminently reasonable for Congress to direct its remedial efforts toward the tribes that had suffered as a result of disastrous federal policies and bureaucratic failings, rather than allocating scarce resources to tribes that, from the federal government's perspective, did not yet exist and would not be subjected to those policies.[5]

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[5] As of the IRA's enactment, the Narragansett Tribe had little, if any, relationship with the federal government. Indeed, as late as 1978, the Solicitor of the Department of the Interior testified before Congress that "the Interior Department ha[d] never determined that . . . the Narragansett Tribe . . . is entitled to tribal status or the Federal services that flow from that status" and that there had never been a judicial determination that the Narragansetts were an Indian tribe. *Joint Committee Hearing on S. 3153 and H.R. 12860*, 121

The First Circuit itself acknowledged that one of the purposes of the IRA was to "remed[y] the perceived ills of the prior practice of allotment" and that allotment "would not have affected later-recognized tribes, and hence there would have been no reason to include such tribes within the ambit of the statute." *Pet. App.*, 21. The court nonetheless accepted, without citing any supporting case law or legislative history, "[t]he Secretary's . . . view that the Act was intended not only to remedy past wrongs, but also to set a template for the future that would encourage the strength and stability of tribal communities." *Pet. App.*, 21. The court then concluded—again without citing any authority—that "[b]ased on this view, it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934" and noted that several of the IRA's provisions "have nothing to do with land consolidation." *Id.*

The First Circuit's view is a textbook example of a court failing to heed this Court's warnings about improperly substituting an agency's policy determination for Congress' intent as reflected in the text of the statute. *See, e.g.*, *Zuni*, 127 S. Ct. at 1543. The IRA's text is clear, and limiting its application to tribes recognized and under federal jurisdiction in 1934 is consistent with its purposes.

The Secretary and the First Circuit may believe it would have "made more sense" for

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(June 20, 1978) (Statement of Leo M. Krulitz, Solicitor, Department of the Interior).

Congress to apply the IRA to all tribes, but that simply is not their decision to make. Allowing the First Circuit's decision to stand would give the clear "impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Id.* at 1551 (Kennedy, J., concurring). Indeed, the First Circuit's reliance on legislative history to support the Secretary's counter-textual reading in this case is "nothing other than the elevation of judge-supposed legislative intent over clear statutory text." *Id.* at 1551 (Scalia, J., dissenting). That is always a dangerous proposition, but the danger is particularly acute here given that the Secretary has a guardianship responsibility to this Tribe and other tribes that makes careful judicial oversight all the more important to protect the interests of the States and their citizens.

Put simply, the First Circuit failed "to adhere to [its] . . . constitutional role[] . . . [to] determine intent from the statute before [it]." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004). Faced with clear expressions of congressional intent at every turn, the First Circuit strained to find some basis to conclude there is ambiguity that would allow it to defer to the Secretary's erroneous interpretation of the IRA. Indeed the court went so far as to create arguments to support the Secretary's position. That was error. The tools of statutory construction make clear that Congress means what it said, and that applying the IRA in accordance with its plain text is entirely consistent with the Act's purposes.

Moreover, the First Circuit's contortions to support the Secretary's interpretation were unnecessary. Reading the IRA as it is written does not leave post-1934 tribes unable to obtain land. It simply ensures that such grants of land are made by Congress, not the Secretary, pursuant to settlement acts that the States have approved. That guarantees that the States and their citizens have the full ability to protect their interests through the democratic process. A number of post-1934 tribes—including the Narragansett Tribe—have benefitted from that process, which permits the careful weighing of interests that is appropriate when such sensitive issues involving core sovereign interests are at stake.[6]

C. THE PRINCIPLES UNDERLYING *BRAND X* PRECLUDED THE SECRETARY FROM ADOPTING A READING CONTRARY TO A PRIOR JUDICIAL HOLDING

In *Chevron*, this Court made clear that courts—not agencies—ultimately determine whether a statute is ambiguous and therefore provides an agency with gaps to fill using its discretion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Consistent with that principle, this Court recently held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior decision holds that its

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[6] A list of settlement acts is located at page 1 of the appendix.

construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Brand X*"). Consequently, even if there were ambiguity in the IRA, the Fifth Circuit's 1974 decision in *State Tax* precluded the Secretary from adopting regulations ignoring the existing judicial interpretation of the Act.[7]

Although the First Circuit relied on *Brand X* in rejecting Rhode Island's claim that the Secretary's interpretations had changed over time and were therefore not entitled to deference, *Pet. App.*, 37, the court wholly ignored the impact under the first step of *Brand X* of the Fifth Circuit's holding in *State Tax* that the IRA's plain text "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *State Tax Comm'n*, 505 F.2d at 642 (emphasis in original) (quotation marks omitted). That was clear error.

The Part 151 regulations interpreting the IRA to allow acquisitions on behalf of all tribes whenever they were recognized (with some exceptions) were adopted in 1980, six years after the Fifth Circuit's holding. When those regulations

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[7] This is not to say that other *courts* could not disagree with the Fifth Circuit's holding, only that once a court had held the IRA was unambiguous the Secretary could not effectively reverse that decision.

were enacted, no Court had disagreed with the Fifth Circuit's decision and, indeed, this Court had indicated that the IRA applied only to tribes recognized and under federal jurisdiction in 1934. *See United States v. John,* 437 U.S. 634, 650 (1978). The agency's implementation of regulations directly contrary to the unanimous judicial interpretations of the operative statute is an example of agency overreaching to expand its power contrary to the unambiguous text of the statute as interpreted by the courts.

The agency's actions in the face of court decisions finding no ambiguity directly contradict this Court's decision in *Brand X.* The Federal Respondents' treatment of this issue in their opposition to the petition for *certiorari* in this case is telling. They were unable to avoid the clear conclusion that the Fifth Circuit's holding that the IRA's text "positively dictates" that tribal status be determined as of 1934 unambiguously foreclosed the Secretary's contrary interpretation, *State Tax,* 505 F.2d at 642,[8] so they were forced to argue that

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[8] Although the Fifth Circuit did not use the term "unambiguous," it looked only at the text of the IRA in holding that the Act created a temporal limitation and gave no indication that it saw any other permissible construction of the Act. Thus, it appears clear that the Fifth Circuit's holding "'determined [the IRA's] . . . *clear* meaning'" and therefore could not be reversed by the agency's subsequent interpretation. *Brand X,* 545 U.S. at 984 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (emphasis in *Brand X*)).

"the Fifth Circuit's 1974 analysis . . . cannot dictate the construction of Section 19 under *Brand X*, because it predates the rulemaking that adopted the Part 151 regulations." *Resp. Br. in Opp. to Cert.*, 10. That is a complete misreading of *Brand X*, which addressed the impact of a prior judicial ruling on agency action and expressly held that "[a] court's *prior judicial construction of a statute* trumps an agency construction otherwise entitled to *Chevron* deference . . . *if the prior decision* holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added).[9] Thus, it is clear that when enacting the regulations, the Secretary improperly contravened an existing judicial holding that the IRA applied only to tribes recognized and under federal jurisdiction in 1934.

Chevron reiterated the well-established principle that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (citing cases). As *Chevron* noted and *Brand X* reinforced, it necessarily follows that "if a court . . . ascertains that Congress had an intention on the

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[9] The fact that the Fifth Circuit's decision and the promulgation of the Part 151 regulations predated this Court's decision in *Chevron* does not alter the analysis. *See Chevron*, 467 U.S. at 845 (noting that *Chevron* analysis clearly followed from "well-settled principles"); *see also Sullivan v. Everhart*, 494 U.S. 83, 103 (1990) (Stevens, J., dissenting).

precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. The Fifth Circuit considered the precise question presented here and ascertained—as has every other circuit court but the First Circuit—that the plain text "positively dictates that tribal status is to be determined as of June, 1934." *State Tax Comm'n*, 505 F.2d at 642. The Secretary could not properly ignore that holding to expand his power beyond the limits created by Congress and recognized by the judiciary.

II. THE FIRST CIRCUIT MISCONSTRUED THE SETTLEMENT ACT

The text and history of the Rhode Island Settlement Act establish that it was intended to ensure that Rhode Island would maintain civil and criminal jurisdiction throughout the state (including the settlement lands), in exchange for the Tribe being given a substantial land base worth several million dollars at the time of the settlement. Nonetheless, the First Circuit concluded that the Secretary could effectively undo that agreement administratively decades after the fact by taking land into trust on behalf of the Tribe, thereby largely removing that land from state jurisdiction. Aside from the fact that the IRA makes clear that the Secretary has no authority to take land into trust on behalf of a post-1934 Tribe, reading such a "gaping loophole" into the Settlement Act—contrary to its text and history—was clear error. *Pet. App.*, 80 (Selya, J., dissenting). If allowed to stand, that error will impact States nationwide, both those that have already negotiated settlement agreements and

those that will consider entering into such agreements in the future.

The evidence strongly supports the conclusion that Congress intended the Settlement Act to be the final settlement of any and all claims to land the Tribe might bring and thus preclude the Tribe from enlisting the Secretary to take land outside the settlement lands into trust on the Tribe's behalf. As an initial matter, the Settlement Act's text makes clear that it was intended to preserve the State's civil and criminal jurisdiction throughout Rhode Island.

The Act accomplished this in two steps. First, it expressly preserved the State's jurisdiction as to the approximately 1800 acres of settlement lands provided to the Tribe free of charge in connection with the settlement (while still allowing the Tribe "to establish its own regulations concerning hunting and fishing on the settlement lands"). 25 U.S.C. §§ 1706(a)(3) & 1708(a). Then, the Act precluded the Tribe—or any other tribe—from stripping land outside the settlement lands from the State's jurisdiction by validating all previous transfers of land within Rhode Island, extinguishing all aboriginal title throughout the State and extinguishing all Indian claims "based upon any interest in or right involving such land (including but not limited to claims for trespass damages or claims for use and occupancy) . . . ." 25 U.S.C. § 1705; *see also* 25 U.S.C. § 1712. Thus, by its terms, the Act's text reflects Congress' intent to preserve the State's civil and criminal jurisdiction throughout Rhode Island, while providing the Tribe a substantial land base and allowing it some

limited control over hunting and fishing within that land base.

The Settlement Act's legislative history likewise supports Rhode Island's reading of the Act. The Settlement Act was the culmination of years of difficult and intensive negotiations among the parties, with the Tribe represented by counsel and obtaining the benefit of favorable pre-trial court rulings on important issues. H.R. Rep. 95-395, p. 6. The end result was that, in return for a generous land base worth several million dollars, the Tribe agreed to extinguish any Indian claims it had to lands—other than the settlement lands—anywhere in the United States. In addition, Congress went even further and extinguished all Indian land claims—by any tribe—within the Rhode Island. This was necessary because "[e]xtinguishment of all potential Indian claims within the state was a precondition to any settlement of the Narragansett claim by the state government." H.R. Rep. 95-395, p. 13. The First Circuit had previously recognized this, noting that "through the Settlement Act 'the tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished.'" *Pet. App.*, 74 (Howard, J., dissenting) (quoting *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22 (1st Cir. 2006) (*en banc*)).

Not surprisingly, the Tribe was initially pleased with the settlement and its representative testified before Congress that "[t]he bills are the result of a course of fair and honorable dealings between Indians and non-Indians, which is rare in the history of this country." *Joint Committee*

Hearing, 112 (Statement of Eric Thomas, Tribal Secretary, Naragansett Tribe). The Tribe understood "that the State of Rhode Island wanted to have it clear that there would not be Indian claims in the future in Rhode Island," and agreed that the settlement and extinguishment were equitable. *Id.* at 113 (Statements of Thomas Tureen, Tribal Attorney and Ferris Dove, Narragansett Councilman). Ultimately, the Tribe hoped that the settlement would "open the door for a new age of mutual understanding and trust between our people and our neighbors." *Id.* at 112 (Statement of Eric Thomas, Tribal Secretary, Narragansett Tribe).

Unfortunately, the good feelings engendered by the settlement did not last long, and the Tribe began to chafe at the state jurisdiction it had agreed to under the Settlement Act in exchange for the settlement lands. The Tribe's efforts to avoid state jurisdiction continued with the parcel at issue in this case.[10] After the Tribe purchased the parcel—which is outside the settlement lands but within the aboriginal lands claimed by the Tribe in

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[10] There are several other examples of the Tribe's efforts to undermine the state jurisdiction established by the Settlement Act. The most recent involved the Tribe's unsuccessful claim that it was exempt from state cigarette tax requirements and marketing that claimed exemption by operating a smoke shop on settlement lands "sell[ing] unstamped, untaxed cigarettes at prices substantially below market." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 20 (1st Cir. 2006) (*en banc*), *cert. denied*, 127 S.Ct. 673 (2006).

its land claim suit—the Tribe argued that those lands immediately became "Indian country" outside the reach of state law and that the Tribe could therefore construct "a housing complex without obtaining various permits and approvals pursuant to state law and local ordinances." *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 911 (1st Cir. 1996). After the First Circuit rebuffed the Tribe's claim, the Tribe filed the trust application that led to this suit. *Pet. App.*, 12-14. Thus, this action is simply the Tribe's latest attempt to keep the benefit of its bargain—the settlement lands—while depriving Rhode Island of the benefit of its bargain, namely, the state jurisdiction that was a clear precondition to the settlement.

The First Circuit majority ignored that history and the evidence of Congress' intent in both the Settlement Act's text and legislative history to reach an absurd result that grants the Tribe the power to unilaterally undo the Settlement Act by enlisting the Secretary to take land into trust. That gives the Tribe and the Secretary the ability to "swap the Settlement Lands for adjacent lands and undo any limitations contained in the Settlement Act." *Pet. App.*, 76 (Howard, J., dissenting). That was certainly not what Congress had accomplished and intended in the Settlement Act, and there is not a shred of evidence that it is what the parties intended. Indeed, when the Settlement Act was signed into law in October 1978, both this Court and the Fifth Circuit (the only courts to have addressed the issue) had indicated that the Tribe—which was not recognized by the federal government in 1934 and had not

even been recognized in 1978—would never be eligible to have land taken into trust on its behalf under the IRA at all.

The First Circuit's response to this glaring hole in its argument is to claim that "the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." *Pet. App.*, 44 (emphasis added). That ignores the fact that it is the Tribe—not the Secretary—that initiates the land into trust process. 25 C.F.R. § 151.9 ("An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary."). The Settlement Act—and the agreement it embodies—clearly precluded the Tribe from pressing such a claim, which is a quintessential claim "'raised by *Indians qua Indians*.'" *Pet. App.*, 74-75 (Howard, J., dissenting) (quoting H.R. Rep. 95-1453, at 12). Thus, there was no statutory authority for the acquisition and the Secretary was bound to deny the Tribe's request. 25 C.F.R. § 151.10 (requiring the Secretary to consider limitations on the statutory authority for an acquisition).

Ultimately, as the dissents by Judge Howard and Judge Selya establish, a review of the evidence of Congress' intent with regard to the Settlement Act leads inexorably to the conclusion that the Act was intended to preclude the expansion of tribal sovereignty to lands outside the settlement area. Following extensive negotiations, the Settlement Act gave the Tribe 1800 acres of land worth several million dollars. In exchange, the Tribe willingly

agreed to be subject to the State's jurisdiction and not to press Indian claims to other lands within the State. The Secretary should not now—30 years after the fact—be permitted to upset this agreement at the Tribe's request through "the contrivance of the Secretary's taking the Parcel into trust, to walk away from an arrangement that it helped to fashion and from which it has benefitted over the years." *Pet. App.*, 81 (Selya, J., dissenting). Allowing the Secretary to do so will cast serious doubt on the ability of settlement acts generally to resolve Indian claims, and severely reduce States' incentive to negotiate and enter into such agreements.

III. THE FIRST CIRCUIT'S ERRONEOUS DECISION WILL HAVE SUBSTANTIAL NEGATIVE IMPACTS ON STATES NATIONWIDE

This case illustrates the real-world consequences of taking land into trust. Land taken into trust is removed from state authority in several respects, including taxation, land use restrictions and certain environmental regulations. Here, the Tribe purchased the parcel at issue outside the settlement lands and—based on that purchase—claimed the authority to construct a housing complex without complying with the permitting and approval processes designed to ensure that structure's safety. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 910 (1st Cir. 1996).

When the First Circuit rightly rebuffed that initial attempt by the Tribe to unilaterally remove

lands from state jurisdiction, the Tribe enlisted the Secretary to take the land into trust in another effort to avoid the permitting requirements. *Pet. App.*, 13-14. This time the Tribe succeeded at the First Circuit, and, if that decision is allowed to stand, the Tribe will be able to construct its housing complex without obtaining the necessary approvals.

The consequences of the First Circuit's decision are more than hypothetical. Within the settlement lands Rhode Island has full civil and criminal jurisdiction to *inter alia* protect health and safety. 25 U.S.C. § 1708. The sole limitation on that jurisdiction is that the Tribe has the authority, "after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands." 25 U.S.C. § 1706(a)(3). However, even within that core of retained tribal sovereignty in the areas of hunting and fishing, Rhode Island is given the ability to require that the Tribe establish "minimum standards" that ensure the "safety of persons and protection of wildlife and fish stock" within the settlement lands. *Id.*

Under the First Circuit's decision, Rhode Island will have no authority to protect health and safety on the parcel acquired in trust, or presumably any other parcels the Tribe subsequently purchases within Rhode Island and has the Secretary take into trust. This leads to the bizarre result that the State—which fought to retain its jurisdiction over all lands within its borders—has more authority to protect a fish on the settlement lands than it does to protect the

humans on the trust lands. That is not the result Congress intended, and recent events illustrate the serious public safety concerns that can follow from inadequate building codes. *See, e.g.*, Chris Patsilelis, *The storm that smashed New England*, Houston Chron., Oct. 5, 2003, at 21 (discussing "the great New England hurricane of 1938 [which] was among the most catastrophic natural disasters in U.S. history," and struck Charlestown, Rhode Island).

Although the First Circuit's decision will have serious consequences for Rhode Island, its repercussions will be felt throughout the nation. By reading the "now" limitation out of the IRA, the Secretary has vastly expanded the scope of his trust power to allow himself to take land into trust on behalf of any tribe, whenever recognized.[11] That poses a significant threat to the States, particularly in light of many post-1934 tribes' growing wealth resulting from Indian gaming. *See, e.g.*, *Connecticut v. DOI*, 228 F.3d 82, 85 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (noting that "[i]n

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[11] As of January 1947, there were "195 tribes, bands, and communities, or groups thereof, which [were] under the Indian Reorganization Act, excluding Indians in Oklahoma and Alaska," which were not initially covered by many of the IRA's provisions. U.S. Indian Serv., *Ten Years of Tribal Government Under I.R.A.*, 2-3 (1947). By contrast, as of 2008, there were 300 such tribes. *See* Dep't of the Interior, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 73 F.R. 18553 (April 4, 2008).

less than a decade the . . . Mashantucket Pequot Tribe developed one of the most profitable casinos in the United States . . . grossing nearly $1 billion annually"). For example, in discussing the Mashantucket Pequot Tribe—recognized in 1983 pursuant to a settlement act—the Second Circuit noted that:

> Motivating all of plaintiffs' arguments is their final claim that a decision today in defendants' favor would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut. And indeed, we find nothing in the Settlement Act itself that would prevent such a result.

Id. at 94. Thus, the trust power has the capacity to change the character of an entire state. Allowing the Secretary to unilaterally expand his ability to exercise such far-reaching power beyond the clear limits Congress established is untenable. The First Circuit's decision should be reversed.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request that the Court reverse the First Circuit's decision.

RICHARD BLUMENTHAL
Attorney General of
Connecticut

*Robert J. Deichert
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020
FAX (860) 808-5347

LIST OF SETTLEMENT ACTS

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. § 941 *et seq.*

Rhode Island Land Claims Settlement, 25 U.S.C. § 1701 *et seq.*

Maine Indian Claims Settlement, 25 U.S.C. § 1721 *et seq.*

Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Connecticut Indian Land Claims Settlement, 25 U.S.C. § 1751 *et seq.*

Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. § 1772 *et seq.*

Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773 *et seq.*

Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. § 1774 *et seq.*

Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775 *et seq.*

Crow Land Claims Settlement, 25 U.S.C. § 1776 *et seq.* (impacting lands in Montana).

Santo Domingo Pueblo Land Claims Settlement, 25 U.S.C. § 1777 *et seq.* (impacting lands in New Mexico).

Torres-Martinez Desert Cahuilla Indians Claims Settlement, 25 U.S.C. § 1778 *et seq.*

Cherokee, Choctaw and Chickasaw Nations Claims Settlement, 25 U.S.C. § 1779 *et seq.* (impacting lands in Oklahoma).

Pueblo De San Ildefonso Claims Settlement, 25 U.S.C. § 1780 *et seq.* (impacting federal land); *Alaska Native Claims Settlement Act*, 43 U.S.C. § 1601 *et seq.*

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DONALD L. CARCIERI, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, ET AL.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION and THE RISC FOUNDATION, INC. AS AMICI CURIAE SUPPORTING PETITIONERS

BRUCE N. GOODSELL
(deceased)

16 High Street
Westerly, RI 02891
(401) 596-1948

LANA E. MARCUSSEN

CIRCA
4518 N. 35th Place
Phoenix, AZ 85018
(602) 635-1500

JOHN BEN. CARROLL
Counsel of Record

Carroll & Carroll
Lawyers, PC
441 South Salina St
Syracuse, NY 13202
(315) 474-5356

Attorneys for Amici Curiae

CURRY & TAYLOR ♦ (202) 393-4141

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MOTION OF THE CITIZENS EQUAL RIGHTS FOUNDATION AND THE RISC FOUNDATION, INC. FOR LEAVE TO FILE A BRIEF OUT OF TIME AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

The Amici Curiae CERF, RISC, request leave to file their Amici Brief out of time. The reason for the request, is that Bruce Goodsell of Rhode Island, counsel for the Citizens Equal Rights Foundation, (CERF), and RISC Foundation, Inc., died the day before the Amici Brief was required to be filed, i.e., June 13th, 2008. The undersigned was first retained as counsel of record at the end of the day on Friday, June 13th, 2008. I required the time that has lapsed to review, and revise the Brief, arrange print, obtain copy, and serve. The present submission is the earliest the Brief is available for service.

The Brief raises independent points, and arguments. It is of importance to the Amici Curiae who, as residents adjacent to the affected parcel, have been adversely affected by the Decision of the Lower Court. Consents are accompanying.

John Benjamin Carroll
Carroll & Carroll Lawyers, PC
441 South Salina Street
Syracuse, New York 13202
(315) 474-5356

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT. 2

ARGUMENT 3

CONCLUSION 34

APPENDIX

Department of the Interior, Memorandum for the Press (2/13/1934) 1c
Bulletin – The Howard/Wheeler Bill – Q&A 7c
Statement by Commissioner John Collier 13c
Final Downsized List from the Committee Indian Affairs 1937 ..... 17c

TABLE OF AUTHORITIES

Page

CASES

ALASKA V. NATIVE VILLAGE OF VENETIE, 522 U.S. 520 (1998) 31
ARIZONA V. CALIFORNIA, 373 U.S. 546, 603-5 (1963) 32
CHEVRON USA, INC. V. NATURAL RESOURCES DEFENSE COUNCIL, 467 U.S. 837 (1984) 24
CITY OF SAULT STE. MARIE V. ANDRUS, 532 F.SUPP 157, 167-8 (D.D.C. 1980) 27
CITY OF SHERRILL V. ONEIDA INDIAN NATION, 544 U.S. 197 (2005) 2
CITY OF TACOMA V. ANDRUS, 457 F.SUPP 342 (D.D.C. 1978) 26
COLLINS V. YOSEMITE PARK, 304 U.S. 518 (1938) 9
DRED SCOTT V. SANDFORD, 60 U.S. 393 (1857) 10
ELK V. WILKINS, 112 U.S. 94, 99 (1884) 11, 21
FLETCHER V. PECK, 10 U.S. 87 (1810) 30
HAMDI V. RUMSFELD, 542 U.S. 507 (2004) 33
HYNES V. GRIMES PACKING, 337 U.S. 86, 123 (1949) 22
JOHNSON V. MCINTOSH, 21 U.S. 543 (1823) 6
MCCLANAHAN V. ARIZONA, 411 U.S. 164 (1973) 23
MESCALERO APACHE V. JONES, 411 U.S. 145 (1973) 23
MORTON V. MANCARI, 417 U.S. 535 (1974) 21, 24, 27
ONEIDA INDIAN NATION V. COUNTY OF ONEIDA, 414 U.S. 661 (1974) 3, 15
RASUL V. BUSH, 542 U.S. 466, 471 (2004) 33
RHODE ISLAND V. NARRAGANSETT INDIAN TRIBE, 19 F.3D 685, 689 N.2 (1ST CIR. 1994) 15
STEVENS V. COMMISSIONER OF THE INTERNAL REVENUE, 452 F.2D 741 (9TH CIR. 1971) 24
UNITED STATES AS GUARDIAN OF THE WALAPAI V. SANTA FE PACIFIC RAILROAD, 314 U.S. 339 (1941) 18
UNITED STATES EX REL KENNEDY V. TYLER, 269 U.S. 13 (1925) 30
UNITED STATES V. CRAMER, 261 U.S. 219, 227 (1923) 18, 20
UNITED STATES V. DONNELLY, 228 U.S. 243 (1913) 29

UNITED STATES v. GRATIOT, ET AL, 39 U.S. 526 (1840) 8
UNITED STATES v. JOHN, 437 U.S. 634, 645-46, 650 (1978) 14
UNITED STATES v. KAGAMA, 118 U.S. 375, 384-5 (1886) 23
WORCESTER v. GEORGIA, 31 U.S. 515 (1832) 6

STATUTES

25 U.S.C. § 177 ..... 3, 4
25 U.S.C. § 463 ..... 16, 26
25 U.S.C. § 463 - § 464 26
25 U.S.C. § 464 26
25 U.S.C. § 465 ..... *passim*
25 U.S.C. § 478 6
25 U.S.C. § 479 ..... 5, 7, 21, 28
25 U.S.C. § 1701 ..... 3, 16
25 U.S.C. § 1702(j) 9
25 U.S.C. § 1704 9
25 U.S.C. § 1705(a)(2) 15
25 U.S.C. § 1709 ..... 10, 16
25 U.S.C. § 2202 11
25 U.S.C. § 2719 28
41 Stat. 3 30
43 U.S.C. § 1715(c) 16
46 Stat. 1106 31
48 Stat. 988 5
72 Stat. 403 10
R.I. General Laws § 37-18-13 9
R.I.Gen.Laws § 37-18-14 15

REGULATIONS

25 C.F.R. § 1.4 5
25 C.F.R. § 150.2(h) 11, 30
25 C.F.R. § 151.2(-) 21
25 C.F.R. § 292.2 12

25 C.F.R. Part 151 27
25 CFR Part 292 28
43 C.F.R. Part 4 ..... 9, 10
73 F.R. 29376 12
73 F.R. 29378 28
73 F.R. 30144-30146 32

INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the First Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property which may be taken into trust all over the United States.

The RISC Foundation, Inc., incorporated in the State of Rhode Island, is headquartered in Charlestown, where the lands to be taken into trust lie. It is the purpose of the foundation to identify and address significant issues affecting the quality of life in Rhode Island. Allowing the Narragansett Indian tribe to assert sovereignty over fee lands taken into trust pursuant to 25 U.S.C. § 465 will adversely affect all citizens of Rhode Island.

Members of the RISC Foundation, Inc., further are resident citizens of the United States, Rhode Island, and the Township of Charlestown. They are homeowners in the residential area where the parcel at suit is located. They live in the immediate vicinity of the 31 acres. They share a common road; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs

resulting from any proposed use of the parcel made by the Narragansett Tribe, including a casino. Any proposed use could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of Rhode Island and the Town are not applicable to the parcel. They are impacted by the application of 25 U.S.C. § 465 and the Part 151 regulations that affect their rights to due process and equal protection of the law.

All parties have consented in writing to the filing of this Amici Brief.[1]

SUMMARY OF THE ARGUMENT

The first section of this brief addresses the Rhode Island Indian Claims Settlement Act and how the proposed action of the Secretary of the Interior under 25 U.S.C. § 465 to take 31 acres into trust destroys state control over its lands, the key benefit of the mutual agreement with the Secretary and Tribe with the State and Town of Charlestown. The second section discusses federal case law and how the "Indian trust" was used to create unlimited Secretarial discretion to benefit Indians under 25 U.S.C. § 465. The last section explains how this Court can apply its prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to restrict Section 5 of the Indian Reorganization Act (IRA) as Congress intended and under principles of equity to protect the intent of the

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, RISC and CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

agreement as agreed to by the parties and as enacted in the Settlement Act by Congress.

ARGUMENT

The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. § 1701, *et seq.*, settled two lawsuits in 1978 asserting aboriginal title claims of the Narragansett Indian Tribe in the Town of Charlestown, Rhode Island. These claims followed the pattern created by this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that allowed the Oneida Indian Nation to sue to reclaim aboriginal rights they claimed violated the Nonintercourse Act of 1790, 25 U.S.C. § 177. This Court in the *City of Sherrill* ruling, by applying the equitable doctrine of laches to *Oneida I* has attempted to limit the mischief caused by confusing the land status of land under state jurisdiction in the East with federal public lands reserved in the West for Indian tribes before statehood. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not reach the issue of whether the "rebalancing of the equities" prevents the Secretary from undoing the benefit of the Settlement Act to the Rhode Island parties.

This brief explains why Section 5 of the IRA, 25 U.S.C. § 465, as Congress intended, must be confined to reservations of federal public domain lands that have never been subject to state jurisdiction. Under this standard, the Narragansett Tribe is not eligible to have lands placed into trust status under 25 U.S.C. § 465.

I. THE INDIAN REORGANIZATION ACT IS A PUBLIC LAND LAW THAT SHOULD ONLY APPLY IN THE WESTERN STATES

A. *The Settlement Act Did Not Create A Federal Indian Reservation In Rhode Island*

Sections 1705(a) and 1712(a) of the Settlement Act are very straightforward. They extinguish any and all aboriginal claims of the Narragansett Tribe in Rhode Island upon acceptance of the lands purchased and transferred under the settlement and at any other location in Rhode Island. It is uncontested that the Settlement Act was executed and that the Tribe's Indian title and Nonintercourse Act, 25 U.S.C. § 177, claims are extinguished. As the Rhode Island parties have argued, this case is about the authority of the Secretary of Interior to place additional lands purchased by the Tribe into trust for the Narragansett Tribe through 25 U.S.C. § 465. The Secretary asserts unlimited authority to take any lands purchased by any Indian tribe into trust status. The Secretary and United States assert that the Settlement Act does not apply to limit Secretarial authority to accept additional lands into trust status for the Narragansetts. The question of whether the Secretary has authority to accept fee lands purchased by or for the Narragansett tribe into trust depends on the intent of Congress in enacting the Indian Reorganization Act (IRA). This brief incorporates the reasoning of the State parties and adds to it by including the final tribal listing of Indian tribes that had accepted the IRA in 1939 and the contemporaneous writings of Commissioner of Indian

Affairs John Collier, the primary author of the bill that became the IRA.[2]

The Petition for Certiorari addresses this question by applying the definition of "Indian" in 25 U.S.C. § 479:

> Sec. 479. Definitions
> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of **any Indian reservation**, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians **residing on one reservation**. (emphasis added).

(June 18, 1934, ch. 576, Sec. 19, 48 Stat. 988.)

This definition by its express terms applies only to tribes on federal Indian reservations because these

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[2] The Amici like the State of Rhode Island do not agree with the conclusion that land taken into trust necessarily becomes Indian country. Amici further disagree that land taken into trust pursuant to 25 U.S.C. § 465 automatically restores the attributes of tribal sovereignty. As the State asserts, 25 C.F.R. § 1.4 allows the Secretary to restrict lands taken into federal trust to state jurisdiction as done for the 1800 acres encompassed by the Settlement Act.

were the only Indian tribes under federal jurisdiction in 1934. Tribes located on lands under state jurisdiction were subject to the laws of the state where they resided just as all off reservation Indians still are today. The definition in Section 479 is therefore critical to enforcing the IRA as Congress intended.

The IRA definition of "Indian" in Section 479 uses land status to determine whether an Indian tribe was recognized and was "now under federal jurisdiction" on June 1, 1934. Landless tribes were combined or consolidated with tribes that had a federal Indian reservation. Only Indian tribes on reserved federal territorial land were under federal jurisdiction. These were the only Indian tribes retaining their inherent sovereignty. Inherent tribal sovereignty is based on the retention of "Indian title" as defined in *Johnson v. McIntosh*, 21 U.S. 543 (1823) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Only tribes that held Indian title and exercised inherent sovereignty could have a government to government relationship with the United States. These were the tribes entitled to vote on whether to adopt the IRA under the original 25 U.S.C. § 478.

When more than half of these originally qualified tribes with federal Indian reservations rejected the IRA, the interpretation of the voting regulations promulgated under Section 478 was expanded to include any Indian tribe receiving federal assistance through a treaty obligation or federal statute. This qualified many of the Eastern tribes and California bands that had not originally been allowed to vote on

the IRA to vote before the deadline expired.[3] The Narragansett Tribe was specifically not allowed to vote on the IRA because it had never been under federal jurisdiction. J.A. 23a-24a. Not surprisingly, Congress reacted to the manipulations of the voting on the IRA. In January 1937, the Chairman of the Senate Indian Affairs Committee asked for a finalized list of tribes that had adopted the IRA in order to put a stop to further regulatory manipulations of the eligible Indian tribes as defined in Section 479 of the IRA. Amici located the original tribal listings of the Indian tribes "recognized under the IRA" prepared by Commissioner Collier as requested in January 1937 by Senator Elmer Thomas in the National Archives. These lists were revised into one final list after Congress threatened to repeal the IRA. This final revised list from 1939 is attached.[4] All of the Indian tribes on these lists are located on reservations of federal public domain land in the West.

The MEMORANDUM FOR THE PRESS, (PRESS MEMO, p.1c-6c) outlines the "sweeping bill" introduced by Representative Edgar Howard of Nebraska. This Memo and two other Collier documents attached to this brief make it very clear that all Indians and Indian Tribes were either considered "landless" or were physically located on lands subject to the federal

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[3] Section 478 as originally adopted by Congress as Section 18 of the IRA required the Secretary to call an election on whether to accept the IRA within one year of its passage. The tribal voting concluded on June 17, 1936.

[4] Amici located two lists and correspondence from the Committee on Indian Affairs in 1937. The third list that is attached is the final downsized list that adheres to the definitions as contained in 25 U.S.C. § 479. (p.17c-29c).

public land laws of the United States as required by Section 479. This bill was intended to create separate tribal municipal governments and claimed the authority in the United States Congress to do this. There is only one clause of the Constitution that contains authority for the federal government to establish local governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire new territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840).

As this initial PRESS MEMO makes absolutely clear, this was the first purpose of the bill introduced on February 12, 1934 that eventually became the IRA. (p.1c, 3c). Therefore, this bill applied directly to Indians and Indian tribes located on federal reserved public domain lands that still held their territorial land status and inherent sovereignty rights. Pet. App. 23-4, 27. The second purpose of the Wheeler-Howard Bill was to end the allotment practices of the Dawes General Allotment Act. The bill was intended to be "along the lines of the subsistence homestead projects now being developed by the government for white communities." (p.2c) The only lands that could be allotted were federal public lands subject to disposal by Congress under the Property Clause. The irrefutable fact; the IRA was intended to apply only to Indians and Indian tribes located on federal public domain territorial lands. This fact, if overlooked by the federal courts, allows the

Secretary to expand the IRA beyond its constitutional limits.

As a settlement to the land claim suit brought by the United States in 1975 pursuant to *Oneida I* against the State on behalf of the Narragansett Tribe, the State of Rhode Island made a permanent cession by legislative act for the federal purpose of providing land for the Narragansett Tribe. See Joint Memorandum of Understanding (JMOU), J.A. 25a-30a, see also R.I. General Laws § 37-18-13 through § 37-18-14. Congress accepted this ceded land in the Settlement Act by defining "transfer" in 25 U.S.C. § 1702(j) as including a conveyance. The convoluted path through the land management corporation does not change this fact. The lands purchased by the United States with the assistance of the Governor of Rhode Island under 25 U.S.C. § 1704 were specifically included in this conveyance under the single transfer that occurred after the Tribe became federally recognized. J.A. 39a-42a.

Technically, the land encompassed in the Settlement Act is a federal enclave. The Enclave Clause, Art. I, Sec. 8, Cl. 17, allows Congress to obtain land in a state with state approval for the purpose of forts, arsenals and other necessary buildings. Ceding lands for a federal enclave allows the state to reserve to itself jurisdiction it wishes to retain. *See Collins v. Yosemite Park*, 304 U.S. 518 (1938). The State has consistently made this argument. The Interior Board of Indian Appeals (IBIA) concluded that it presented a constitutional question beyond its jurisdiction. J.A. 54a., Pet. App. 9, 50, 52-3. The jurisdiction of the IBIA was defined as 43 C.F.R. Part 4. J.A. 46a. Title 43 is for

federal Public Lands subject to the Property Clause. The ceded Narragansett land is not reserved federal public domain territorial land. As a federal enclave, Congress accepted specific jurisdictional rights for the State over the land reserved in its act of cession. *Id.* at 528. Although the United States now has primary jurisdiction to regulate the Narragansett tribe as a tribe, the State of Rhode Island retains civil and criminal jurisdiction as well as conservation authority over the land as reserved in 25 U.S.C. § 1709 enforceable against the tribal members individually. This is no different than what the United States did with Fort Varnum in 1958, a true federal enclave titled back to the state with express reservations. 72 Stat. 403.

Importantly, due to the express extinguishment of aboriginal title in the Settlement Act, no land in Rhode Island can be characterized as federal territorial land unless this Court is willing to apply the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) today. This is not an exaggeration. Even the PRESS MEMO quoting Commissioner Collier says "It [this bill] seeks to give to the Indians the simple right -- the inalienable right of all men who are not slaves -- of establishing an elementary form of self-government, organizing for collective action, and taking part in the management of their own affairs." (p.1c) The *Dred Scott* decision is most remembered for its positions on slavery. What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id.* at 404, 420. This Court using its equity jurisdiction has

preserved the *Dred Scott* decision as part of federal Indian common law. *See Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

B. *The Secretary erroneously assumes that taking fee lands into federal "trust" ownership creates federal territorial land identical to reserved federal public domain land in the West.*

In order to apply 25 U.S.C. § 465 for the Narragansett tribe, the Secretary of the Interior is characterizing the Settlement lands of the Narragansett Tribe as a "federal Indian reservation." In 1980, the Secretary promulgated the Part 151 regulations expanding Section 5 of the IRA, 25 U.S.C. § 465, to allow fee lands purchased by Tribes to be defined as "Indian land" as a generic term under his authority as trustee. 25 C.F.R. § 150.2(h) and § 151.2(d)-(g). By equating all types of "Indian land," the IRA is converted from a federal public lands statute that only applies to increasing or using the land base of actual reserved federal territorial land in the West to all types of land still occupied by Indians, including state reservations in the East. See also 25 U.S.C. § 2202.[5]

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[5] The Indian Lands Consolidation Act of 1983 says: "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: Provided, that nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits or restricts the acquisition of land for Indians with respect to any specific tribe, reservation or state(s)." 25 U.S.C. § 2202. This amendment to the IRA was passed the same year the Narragansett Tribe was given federal recognition and the Settlement lands were taken into trust under 25 U.S.C. § 465. Neither 25 U.S.C. § 465 or § 479 were amended by this act. Therefore, this act can be read as Congress intending to limit the Secretary's new Part 151 regulations to only those tribes

There is no federal public domain land in Rhode Island and no federal land was ever "reserved." This assumed secretarial discretion to change the definition of "Indian land" and assume all tribal lands confer the same tribal sovereignty rights as a real federal Indian reservation allows the unlimited territorial authority as defined in *Dred Scott* to apply to the people and State of Rhode Island. Allowing the word "reservation" in Section 479 to apply to any lands occupied by Indians whether the land was reserved federal public domain land or not expands the IRA and specifically Section 465 well beyond what Congress intended when it passed the IRA in 1934.[6] It also violates separation of power principles by allowing the Secretary discretion to define lands taken into trust pursuant to 25 U.S.C. § 465 as having the attributes of sovereign Indian land reserved by the United States with "Indian title."

The PRESS MEMO says that landless Indians were going to be assisted through the Wheeler-Howard Bill "through various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership..."(p.2c). It was in the congressional discussion of these "various devices" that the expansive vision of Commissioner

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recognized and "now under federal jurisdiction" on June 1, 1934 as required by Section 479. This interpretation makes sense because it would allow Section 465 to apply to Indian tribes that had real federal Indian reservations that had voted and rejected the IRA in 1935-6.

[6] On May 20, 2008 the Secretary promulgated regulations for 25 U.S.C. § 2719, 25 CFR Part 292, 73 F.R. 29376, that include four definitions of "reservation." 25 C.F.R. § 292.2. Only the first of these definitions applies to actual reserved federal land. The other three definitions demonstrate the expanded interpretation of "reservation" explained above.

Collier was expressly limited by Congress. One of these "devices" was the idea of the Indians purchasing their own lands or having other persons or entities purchase lands for them that could then be added to existing federal reservations. This fee to trust device was originally in Section 5 of the IRA, but was deleted from the act prior to its passage. The BULLETIN of the Mission Indian Agency of April 16, 1934 (BULLETIN, p.7c-12c) in Paragraph 10 states:

> "The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members."

(underline added to words deleted from final act)(p.11c). This BULLETIN was released almost three months before the IRA was passed by Congress. The device we now call "fee to trust" in the original bill was expressly removed by Congress before it passed the IRA.[7] Therefore, as passed by Congress, the only way to create additional "trust" lands under Section 5 of the IRA, 25 U.S.C. § 465, is for Congress to make a specific appropriation to purchase specified lands for Indians or an Indian tribe.

Congress did not alter the nature of the Indian trust when it adopted the IRA. Under both the Dawes Act and IRA the Indian trust is based on the trust

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[7] The original bills of Collier's plan were S.2755 and H.R. 7902. These bills failed to pass after extensive hearings. The full bill substitute S. 3645 negotiated between Commissioner Collier and Senator Howard Wheeler that became the IRA did not contain any language for "fee to trust."

corpus of the Indian right of occupancy or Indian title. (p.9c) Payments for ceded lands and the remaining lands were deemed to be in trust to protect the lands from alienation and taxation. The IRA altered these individual land rights by extending the trust period indefinitely and by requiring tribal members to exchange trust patent allotments rather than to sell the allotments to non-Indians. This is exactly what this Court concluded in *United States v. John*, 437 U.S. 634, 645-46, 650 (1978).

When the IRA is properly viewed in this context, the act of the Secretary accepting additional lands for the Narragansett Tribe pursuant to 25 U.S. C. § 465 into trust status is a subsequent land transfer as if the originally ceded 1800 acres of land were federal public domain. As said in the concurrence by Justices Rehnquist and Powell in *Oneida I*:

> "The majority today finds this strict rule (mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case) inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by **transferring** land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the original grant of rights in the land but also upon the Federal Government's

> subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." (parentheses and emphasis added).

Id. at 684.

Any subsequent land transfer pursuant to 25 U.S.C. § 465 literally **conveys** land specifically not included in the Settlement Lands that does not meet Justice Rehnquist's above definition from state to federal ownership in trust for the Narragansett Tribe twenty years after specific land parcels were selected and transferred under the express terms of the Settlement Act. (emphasis added). The Settlement Act does not authorize additional land purchases or transfers. The transfer to federal ownership of the ceded land extinguished all tribal aboriginal claims. See 25 U.S.C. § 1705(a)(2) and § 1712(a)(2). Under the Enclave Clause, the State and Congress would have to enact new specific legislation to cede and transfer additional lands to the United States.

In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 n.2 (1st Cir. 1994) the First Circuit confused the land status of the Settlement land. In footnote 2, the Circuit Court said:

> "The State Act amendments themselves suggest that congressional approval of the land transfer is "required and appropriate," ... R.I.Gen.Laws § 37-18-14, and the case law is in accord, *see Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 667-68, ...(1974) (explaining that, as a general rule, Indian tribes may not alienate their

> land without congressional consent). Yet, Congress never ratified the State Act amendments. Because the validity of the title transfer is not directly in issue in this litigation, and because appellants have not acknowledged, much less relied upon, the absence of ratification, we do not explore the consequences of this omission."

Congress cannot ratify a state law. Congress under the Enclave Clause can only accept lands ceded by a state sovereign by its own legislative act. As explained above, this is exactly what happened with the JMOU, Management Act and Settlement Act. See 25 U.S.C. § 1709. This mistake demonstrates the confusion created by *Oneida I* in the Eastern United States.

In the West, the Secretary may convey federal public land to private entities or transfer additional public lands into a federal Indian reservation pursuant to the Federal Lands Policy Management Act and other provisions of the IRA. See 43 U.S.C. § 1701 et seq., 25 U.S.C. § 463 and § 464. This authority should not be applicable in the East.

Rhode Island's sovereignty in retaining civil and criminal jurisdiction is nullified if the ceded lands are treated by the Secretary as federal public land. As a matter of federal land law, the Settlement Act transfer was the only federal acquisition allowed. To hold otherwise, destroys the intent of Congress in protecting the sovereign interests of the State of Rhode Island to maintain state jurisdiction over the transferred land. See 43 U.S.C. § 1715(c). The State of Rhode Island did not consent to any further lands being transferred to federal ownership under the Settlement

Act. As the First Circuit concludes, the Secretary is asserting a federal Indian trust responsibility beyond that delegated in the Settlement Act to place an additional 31 acres into trust. The Secretary claims this authority pursuant to Section 5 of the IRA. Pet. App. 38-49.

II. THE EXPANSION OF THE INDIAN TRUST

How the IRA was put into affect by Commissioner Collier is crucial to understanding the profound impacts resulting even decades later. In 1937, Senator Wheeler attempted to repeal the IRA. In reaction, Collier released a Statement to the Associated Press (AP MEMO, p. 13c-16c) justifying his implementation of the IRA. Collier believed "that the powers vested in Indian tribes through their constitutions may be not only those specified powers named in the Act but 'in addition, all powers vested in **any** tribe or tribal council by existing law.'" (p.14c)(emphasis added).

The IRA was written to take full advantage of the federal Indian common law trust relationship. As the PRESS MEMO states:

> "The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as

> founder and director of the Indian Defense Association."

(p.5c) Collier intended the IRA to use the Indian trust to invoke the paramount sovereign authority of the United States. Although Congress struck out the most blatant parts of Collier's plan including the federal court for Indian claims and fee to trust, his fundamental goal was nevertheless met when this Court decided *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).

A. *The Indian Trust Under the IRA*

In the *Santa Fe* case, the United States asserted the right of the Walapai Tribe to all the lands it had occupied in 1866 within and without its present federal public land reservation. This claim was for all of the aboriginal lands ever occupied by the Walapai Tribe. The United States argued that their policy of enforcing the Trade and Intercourse Acts as prior to and controlling of the grant of federal public land to the railroad was based on the Indian trust relationship. The Trade and Intercourse Acts were applied to the Territory of Arizona in 1851. *Id.* at 347. The application of the Trade and Intercourse acts allowed Indian groups and bands that were just landless Indians under traditional inherent sovereignty principles to have federal lands physically occupied by them to be considered in "trust" status by the Secretary of Interior. *United States v. Cramer*, 261 U.S. 219, 227 (1923). This policy was clearly not based on making a specific reservation for the Walapai Tribe. The argument made in *Santa Fe* is that the "Indian country" territory of the Walapai Tribe was a separate

federal territory merely because the Indians occupied the area. This follows the federal common law separate Indian territory position of the *Dred Scott* decision.

In *Dred Scott*, Chief Justice Taney separated the Indians as a race from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other."

Scott at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they

> thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it."

Id. at 403-4.

Chief Justice Taney's assumptions were utterly untrue. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State in 1788 before the Constitution was in effect. *See Sherrill* at 203. In the West, many Indians had been enslaved under Mexican rule before the United States won the Mexican-American War. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories outside of the Northwest Territory was unlimited by any act of Congress or any clause of the Constitution. *Scott* at 432. This rewriting of the Constitution was done to prevent the Negro race from ever becoming state or national citizens. But the comparing and contrasting of the Indian rights in the *Dred Scott* majority opinion turned the protective Indian trust relationship of the Marshall trilogy into an unlimited federal weapon asserting the "political relationship" with an Indian tribe to challenge the authority of state governments. See Introduction by Nathan Margold. Cohen, F. S. (Ed.) (1940). Statutory

Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians. Washington, DC: Government Printing Office. p. x-xi. The Executive branch by reclassifying an area as "Indian country" can apply the separate unlimited territorial power. Federal Indian land was separated from the Constitution because the Indians were separated from the white society that comprises the Sovereign People. *See Elk v. Wilkins*, 112 U.S. 94 (1884). Therefore, the Indian trust is whatever the federal government decides it is without any Constitutional constraints if the *Dred Scott* opinion remains part of federal Indian common law.

This is why the definition of "Indian" contained in 25 U.S.C. § 479 is so important. Congress expressly defined the application of the IRA to Indians of recognized tribes now under federal jurisdiction on June 1, 1934. This specific definition in the IRA prevents the IRA from being construed as facially unconstitutional as a "race based" classification under the Fourteenth Amendment. Congress in adopting the IRA specifically chose a definition of "Indian" that complied with the Fourteenth Amendment rather than the broader race based classification adopted by Chief Justice Taney in *Dred Scott*. If the IRA applies to all persons of Indian descent no matter what their tribal land status and the concomitant preservation of their inherent tribal sovereignty as defined in 25 C.F.R. § 151.2(-), then it is not based on a continuing political relationship between the tribe and federal government as held by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974). Instead, it is based on the racial classification used in *Dred Scott*.

After the *Santa Fe* ruling, there was no reason for the Secretary of Interior to restrict the claims of the United States on behalf of Indian tribes to federal lands actually reserved for their use. According to Collier, any tribal interest could be asserted against any state or local interest at any time because the recognized Indian tribes were separate territorial governments with direct powers of self-government. Under Collier's view this was not unlimited power because tribal recognition was only a temporary status until the Indians were able to become parts of white society. Collier acknowledged the Indian Naturalization Act of 1924 and did nothing to impair the constitutional rights of Native Americans. BULLETIN p. 8c-9c. His IRA was an early type of affirmative action program. PRESS MEMO p. 1c-6c. But instead of using Section 5 of the Fourteenth Amendment as later established through the Civil Rights Movement of the 1950's, his program relied on attempting to combine the reasoning of the majority opinion in *Dred Scott* with the war power Indian policy of 1871 as codified in the Revised Statutes into a policy promoting tribal sovereignty and Indian self-determination to help the Indians pull themselves out of poverty.

Within a very short time of its passage, the roots of the IRA as defined by Collier became apparent in cases like *Santa Fe* and Congress balked at providing funding to promote its expansive goals. See AP Memo, p.13c-16c. When this Court limited the IRA and the Secretarial expansion of the Indian trust in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) by placing the federal Indian trust lands within the overriding context of the equal application of the law, only a very small amount of land was purchased for Indians by Congress

under Sec. 5 of the IRA. Besides assigning more marginal federal public domain lands to Indian reservations in the West, the IRA had very little impact after 1948. By the mid-1950's Congress was back to terminating tribal status and selling Indian lands.

B. *The Era of Unlimited Indian Trust Authority*

The IRA languished until the American Indian Movement began in the mid-1960's. With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the unlimited territorial power permanent through preservation of tribal sovereignty. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints. J.A. 29a. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. And this Court began issuing opinions unleashing this "Indian trust" power on the States and people. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility." This

Court then directly allowed the Nixon Administration to reinterpret the IRA. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974) and *Oneida I*. These decisions let the Nixon administration, and all subsequent administrations, reinterpret the "political relationships" that existed only on real federal Indian reservations of public domain land under Section 479 of the IRA to being any recognized "political relationship" the Secretary or President recognized at any time. Through federal Indian common law in the 1970's, this Court unleashed the twisted reasoning of *Dred Scott* at the States, local communities and every individual. This massive expansion of the Indian trust was applied to 25 U.S.C. § 465, to achieve the fee to trust power that Congress had expressly removed from the IRA in 1934.

For the Indian trust to become unlimited the federal courts had to assume that the Secretary could interpret the IRA and 25 U.S.C. § 465 to apply to any land classification, just as the First Circuit did in this case. Pet. App. 30-31. Applying *Chevron* deference to the Secretary's interpretation of Section 465 has allowed the Secretary to perpetuate a misinterpretation of the IRA. *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Stevens v. Commissioner of the Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), a Gros Ventre tribal member with trust patent allotments exchanged his lands through the Bureau of Indian Affairs for other allotted lands. The Commissioner claimed the individual Indian owed back federal taxes on the income gained on the exchange of the lands because they were not of equal value and did not qualify as being tax exempt. The case turned on the discretion of the Secretary of the Interior to accept the trust patent lands and

exchange them for other individual allotment lands already held in trust by the United States. The Secretary argued that the exchange of lands was made pursuant to 25 U.S.C. § 465.

In *Stevens*, the Ninth Circuit concluded that all Indian statutes should be construed in *pari materia* as evidencing one continuous federal Indian policy to allow this exchange of allotted lands to be tax exempt pursuant to 25 U.S.C. § 465. *Stevens* at 746-8. In the conclusion of the *Stevens* case the Ninth Circuit opined:

> "Bearing in mind that "doubtful expressions are to be resolved" in favor of the Indians (*Squire v. Capoeman, supra*) and giving weight to the interpretation of the various acts by Interior, we conclude that the Secretary of the Interior has the discretionary power under the Indian Reorganization Act to purchase land for Indians with funds supplied by them and when lands are so purchased they are subject to the implied exemption from income taxation contained in the General Allotment Act."

Stevens at 749.

Exchanging individual Indian trust allotments for other individual Indian trust allotments to preserve their tax exempt status was within the intent of Congress in adopting the IRA in 1934. Section 4 was the provision to restore "surplus lands" allotted under the Dawes Act. Section 4 of the IRA delegated the Secretary discretion to restore or exchange allotted lands within historical territorial reservation boundaries that maintained a reserved right in the United States under the Property Clause for the

protection of Indians. Section 4 of the IRA was codified in 25 U.S.C. § 463 - § 464. Section 4 of the IRA specifically allows the exchange of untaxed allotted lands still restricted from alienation to be exchanged for different untaxed allotments as done in *Stevens*. Instead, in *Stevens* the Secretary claimed the tax exempt status for the exchanged allotted lands was 25 U.S.C. § 465. The Nixon administration misconstrued the IRA in the *Stevens* case. The federal attorneys for the Secretary of Interior could rely on the fact that the federal attorneys for the defendant Commissioner of Internal Revenue were not going to question the statutory interpretation of the IRA made by the Secretary. This allowed the BIA to represent that the exchange of Indian allotted lands was made pursuant to 25 U.S.C. § 465 when the correct provision of the IRA was 25 U.S.C. § 464.

The Ninth Circuit's erroneous language in the conclusion of *Stevens* regarding 25 U.S.C. § 465 was almost immediately used in Washington State to acquire lands within the "historical boundaries of the Puyallup reservation" situated within the City of Tacoma into trust status. *City of Tacoma v. Andrus*, 457 F.Supp 342 (D.D.C. 1978). As in *Stevens*, these lands were also subject to acquisition pursuant to Section 4 of the IRA. Section 4 of the IRA, 25 U.S.C. § 463, specifically addresses the rights of non-Indians located within historic reservation boundaries and balances their interests to the asserted need to reacquire lands for Indians. By intentionally misapplying 25 U.S.C. § 465 to a type of land acquisition specifically addressed in 25 U.S.C. § 463, all of the safeguards incorporated in the IRA for non-Indians are removed from the Secretary's determination of

whether to acquire the additional land for individual Indians or tribes. The *City of Tacoma* case explains how the overbroad language of *Stevens* becomes the basis of the first fee to trust regulations promulgated by the Secretary of the Interior in 1978. *Id.* at 345-6.

Immediately following the *City of Tacoma* decision, the Secretary took lands into trust in the City of Sault Ste. Marie, Michigan. The City sued to stop the fee lands purchased by the tribe that were not situated within historic reservation boundaries from being placed into trust status. However, the City was not considered a person that could raise due process claims. *City of Sault Ste. Marie v. Andrus*, 532 F.Supp 157, 167-8 (D.D.C. 1980). This left the City with standing but no enforceable right against this assumed fee to trust power of the Secretary asserted under Section 5, Section 465, of the IRA. Because of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) that removed the Fourteenth Amendment defense that naturally went against this inequity, there was no means to argue against the asserted Secretarial authority.

The decisions in *Stevens*, *City of Tacoma* and *City of Sault Ste. Marie* are the basis of the fee to trust regulations, 25 C.F.R. Part 151, promulgated pursuant to Section 5 of the IRA, 25 U.S.C § 465. These cases found that 25 U.S.C. § 465 does not encompass interests considered to be within the "zone of interests" for prudential standing for any non-Indian opposing a fee to trust application. The Secretary examines only the interest of the Indian tribe when making a fee to trust decision. This decision making process rests on the misapplication of the IRA as explained above. It is

important to note that the *Sault Ste. Marie* case is cited by the First Circuit as the basis that the Rhode Island parties have no right to question the Secretary's authority under 25 U.S.C. § 465 to place the 31 acre parcel into trust for the Narragansett Tribe. Pet. App. 33-34.

Under the Nixon Indian Policy the Indian trust is unlimited. On January 4, 2008, Assistant Secretary Carl J. Artman, limited the policy of acquiring "off reservation" fee lands into trust status. *See* http://www.indianz.com/News/2008/006483.asp. This policy has been included in the new 25 U.S.C. § 2719 regulations. 25 CFR Part 292, 73 F.R. 29378. The Secretary has for the first time since 1970 interpreted the IRA as imposing a limitation on Secretarial discretion. However, this concession falls far short of limiting the IRA to only Indians and Indian tribes on actual federal Indian reservations as of June 1934 as required by 25 U.S.C. § 479.

III. LIMITING FEE TO TRUST ENDS THE UNLIMITED TERRITORIAL AUTHORITY

It needs to be made clear that proposing to end the unlimited territorial authority of the Nixon Indian Policy does not terminate the Indian trust relationship. All Amici RISC and CERF are proposing to end is the ability of the Secretary of the Interior to apply territorial war powers solely at his discretion to transfer fee lands under state jurisdiction to federal jurisdiction by accepting them in trust pursuant to 25 U.S.C. § 465. As explained by Amicus CERF in its amicus brief for the *Sherrill* case, all federal Indian common law was based on the territorial war power.

(http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf). By applying the definition of "Indian" and "Indian tribe" in Section 479 of the IRA, only reserved federal public domain land can properly be classified as "Indian country." In other words, interpreting the IRA as Congress intended -- a federal public land law to grant tribal self-governance and to correct the Dawes Act-- prevents the Secretary from assuming that all types of Indian land if taken into trust status pursuant to 25 U.S.C. § 465 becomes "Indian country." Lands purchased by Congress by special act as for the Narragansett Tribe or using the express terms of Section 5 of the IRA for the Mississippi Choctaw would be unaffected by such a ruling because Congress itself has set the terms of tribal sovereignty. Such a ruling would terminate the threat of the Executive Branch being able to create federal territorial land anywhere in the United States.

A. *Indian Trust Land is not necessarily Indian Country.*

The federal courts in our early history struggled with how to characterize the land status of areas within sovereign states involved in Indian conflicts. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." "Indian country" developed as a sort of temporary federal territory designation. *See generally United States v. Donnelly*, 228 U.S. 243 (1913). The Constitution contains two clauses that address federal land ownership but does not contain any definitions for land areas within States that are under the temporary control of the United States military to suppress an Indian uprising or rebellion. The Seneca uprising in

New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

As explained previously, Congress expressly removed the fee to trust language in Section 5 of the IRA. Congress held to its previous decision to prevent the Executive from creating any more Indian reservations of federal public land. See Indian Appropriations Act of 1919, Section 27, 41 Stat. 3, 34. The Secretary cannot be allowed to evade the plain language of Section 5 by equating all types of Indian land to reserved federal public domain land for an Indian tribe as done in 25 C.F.R. § 150.2(h) to interpret 25 U.S.C. § 465 as including fee to trust authority.

Prior to 1970, the Secretary of the Interior had five main classes of Indian land. Each of the 5 categories had its own legal description and concomitant finding of how much sovereignty the Indians residing on that land actually retained. All 5 types of Indian land could be held in trust status under the IRA because "trust status" did not mean anything other than the United States protecting its property tax exempt status. Placing lands into "trust" did not mean altering state jurisdiction over the property. By the plain language of the statute the only change of

jurisdiction created by 25 USC § 465 is to make the land exempt from property taxes. Indian land taken into trust before the Part 151 regulations were promulgated kept its underlying status. Privately owned Indian land, tribal land under state jurisdiction and state reservation land did not retain Indian title and was therefore not within the scope of the IRA. These lands were taken into trust under the act of February 14, 1931 (46 Stat. 1106) not under 25 U.S.C. § 465.

By arbitrarily deciding to treat all Indian lands as having the same rights to tribal sovereignty, all Indian land becomes "Indian country" subject to the IRA. This Court rejected this very expansion of the definition of "Indian country" as applied to the land status of the Indian tribes under the Alaska Native Claims Settlement Act in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). The State of Rhode Island has a stronger position than did the State of Alaska that any lands taken into trust for the Narragansett Tribe are not "Indian country." The Settlement Act allowed only one transfer of lands expressly agreed to by the State rather than the after the fact selections of the Native Villages still going on today. If those subsequently selected lands are not "Indian country" surely the same analysis applies in Rhode Island to the 31 acre parcel.

B. *Applying the Sherrill Decision*

The Rhode Island parties have consistently claimed that allowing the Narragansett Tribe to have an additional 31 acres of land taken into trust 20 years later destroys their bargained for benefit of the Settlement Act. The *Sherrill* court found that it had

the authority to protect the "justifiable expectations" of the non-Indian community as a matter of equity. *Id.* at 215-6. Requiring adherence to the terms of an agreement are enforced by principles of equity. This Court should apply its ruling in *Sherrill* to limit the authority of the Secretary to take these 31 acres into trust.

This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to create tribal sovereignty. *Id.* at 213-4. Fee to trust as currently interpreted in the Part 151 regulations is just another version of the same "unification theory." In the original thirteen colonies there never has been any federal territory or federal public domain land to make a "federal Indian reservation." Yet, the Secretary now asserts the authority to take 13,004 acres of fee land into trust for the Oneida Indian Nation of New York. See Record of Decision, May 20, 2008. 73 F.R. 30144-30146.

This Court must begin placing the Indian trust back under the Constitution of the United States. If this Court allows the Secretary to continue to exercise the unlimited fee to trust power, the Indian trust trumps the Constitution and our whole scheme of self-governance. See dissent of Justice Harlan in *Arizona v. California*, 373 U.S. 546, 603-5 (1963). This internal threat to our right to self-governance is more threatening than the loss of rights of prisoners held at Guantanamo Bay Naval Station. Yet, those prisoners currently have more rights to due process of law than the American citizens who are threatened with having tribal sovereignty rekindled in their immediate vicinity.

See Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466, 471 (2004). This Court can limit the disruption and protect the constitutional rights of all the People by restoring the intent of Congress and limiting the IRA to only those Indian tribes on federal Indian reservations of public land as defined in Section 479.

This Court has already asserted its judicial review authority to rebalance the federal common law equities in *Sherrill*. *Sherrill* at 218-20. By correctly interpreting the IRA as a federal public lands statute as defined by Section 479, this Court can rule that the Secretary is beyond his authority to apply Section 5 of the IRA, 25 U.S.C. § 465, for the Narragansett tribe in Rhode Island. This would end the unlimited territorial power assumed by the Secretary of the Interior after this Court's decision in *Oneida I*. The Petitioners have continuously argued that the Settlement Act prevents these 31 acres from being placed into "trust" to create sovereign Indian land in Rhode Island. By extending the rebalancing of the equities from the *Sherrill* decision, this Court can limit the "Indian trust" and restore the interpretation of Section 465 to the original intent of Congress. Congress then can grapple with federalism and separation of powers issues while balancing local community and tribal interests if it chooses to enact fee to trust legislation. Congress is accountable when it balances the competing interests. The limits of tribal sovereignty must be defined by Congress and not by the unaccountable discretion of the Secretary of Interior.

CONCLUSION

The Court should reverse the decision of the First Circuit.

Respectfully submitted,

John Benjamin Carroll
Counsel of Record
Carroll and Carroll
The Galleries
441 South Salina Street
Syracuse, NY 13202
(315) 474-5356

DEPARTMENT OF THE INTERIOR

MEMORANDUM FOR THE PRESS

FOR RELEASE IN AFTERNOON PAPERS OF Tuesday, February 13. 1934.

Washington, D.C., February 13. A sweeping bill, drafted in the Office of Indian Affairs and the Office of the Solicitor of the Interior Department, for the economic rehabilitation of the Indians and for Indian self-government, was introduced in the House of Representatives today by Rep. Edgar Howard of Nebraska. The bill is aimed primarily at stopping the rapid draining of Indian lands and other natural resources into white ownership through the allotment system, and at curbing the hitherto almost autocratic powers of the Office of Indian Affairs over the persons, property, and institutions of the Indians by granting to them the elementary powers of self-government.

"This 'bill of Indian rights', Commissioner Collier stated today, "is the most far-reaching measure of legislation in the whole history of our dealings with the Indians. It is not radical legislation: on the contrary it is conservative. It seeks first of all to stop the shocking waste of Indian lands and natural resources which the government has permitted and encouraged for more than half a century. It seeks to give to the Indians the simple right - - the inalienable right of all men who are not slaves – of establishing an elementary form of self-government, organizing for collective action, and taking part in the manage-ment of their own affairs. This bill thus strikes a double blow at the two fatal weaknesses of Indian administration across a whole century: first,

the dissipation of the Indian estate and the progressive pauperization of the Indians, and second, the suppression of Indian tribal and social and religious institutions and the steadfast failure of the Government to organize any effective plan of collective action by which the Indians could advance in citizenship and protect their rights."

"The allotment system has been disastrous to the Indians," Collier continued "because it has taken away from them the only means of self-support which most of them are equipped to use, namely, the land. The allotment act of 1887 is largely responsible for the existence of one hundred thousand landless Indians, most of whom are paupers."

In the economic field, the bill proposes to repeal the allotment law of 1887, through which the Indians have lost two-thirds of their lands to the whites, to prevent any further alienation of Indian lands outside of Indian ownership, to put allotted lands, especially grazing and forest lands, back into community ownership, to prevent overgrazing, to place the Indian forests, of which there are eight million acres, on the basis of continuous productive forestry management, and to develop Indian farming, livestock raising, and other land use along the lines of the subsistence homestead projects now being developed by the government for white communities. While the bill provides various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership, it carefully safeguards the vested rights of Indian allottees and heirs.

As pointed out by Commissioner Collier, the white man's system of fee patent ownership has not worked with the Indians, for the reason that most of them, once they received title to their allotments, could not resist the temptation to sell it to a white man for a little ready cash.

In the field of self-government, the bill proposes to curb the hitherto autocratic powers of the Office of Indian Affairs over the Indians and to substitute in its place a cooperative and advisory relationship. In addition, the bill, in conjunction with the Johnson-O'Malley bill previously introduced, provides a definite system of financial cooperation between the Federal Government and the states whereby many function of health, education, and other Indian services may be taken over by state or local communities, the cost to be reimbursed by the Federal Government. Under the proposed plan of Indian self-government, Indian municipal corporations will be chartered by the Secretary of the Interior, subject to ratification by the Indian community, and those corporations will be endowed with the powers which, in the opinion of the Secretary of the Interior, they are competent to discharge. The bill proposes a progressive and experimental delegation of powers, including police power, public health, establishment of Indian courts, the management of Indian community property, and such other powers as local government ordinarily embraces.

Many of the local functions of the Indian Service may, under the proposed bill, be transferred to the Indian community and carried on by qualified Indian employees: but the Secretary of the Interior is directed

to enforce suitable standards of fitness for such Indian employees.

Moreover, the Indian community may appoint a qualified Indian to any vacancy in the Indian Service if such candidate is found to possess the necessary qualifications.

Indian communities would henceforth, under the terms of the bill, take formal part in preparing budget estimates and making recommendations to Congress for appropriations to assist the communities, and the future expenditure of appropriations covering services transferred to the Indian community would be by its bonded Disbursing Officer, subject to the laws of the United States.

The Indian Service would continue to administer all functions not transferred to the community, would assist the community in developing its self-government, and would require the observance of the charter, protect the rights of minorities, and assure the effective conduct of the community government. Functions which prove not to be efficiently conducted by the community may be retransferred to the Indian Service.

In order to equip the Indians to take over increasing powers of self-government. and business management, the bill sets up a program of educating Indians as administrators, judges, public health officials, foresters, grazing experts, engineers, nurses, accountants, and experts in other fields.

A novel feature of the bill is the provision for compulsory transfer of unsatisfactory local officials of

the Indian Service on charges brought by the Indian community, under rules and regulations by the Secretary of the interior to prevent abuse of this power.

The bill also provides for the creations of a United States Court of Indian Affairs, consisting of seven judges appointed by the President, to have jurisdiction over all cases involving federal crimes committed in Indian reservations, cases to which an Indian tribe or community is a party, and other cases growing out of relations between Indians and whites or out of property rights of Indians. It also provides ten special federal attorneys to assist and advise Indian communities in matters of law and equity.

The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as founder and director of the Indian Defense Association.

"This legislation is important to the Indians," Commissioner Collier said, "because for the first time it gives them a chance to achieve economic and social security, to shake off the deadening clutch of irresponsible bureaucratic domination, and to achieve the freedom and dignity which their history and qualities entitle them to. It is important to the whole country because it offers an opportunity to clean house in the long maladministration of Indian Affairs and to

save vast sums of public money by setting the Indians at last on the road to self support.

"We have no illusions," Collier continued. "about the difficulty of the task ahead. But we know that the Indians all over the country have awakened and are thinking as they have never thought before. We know too that Indian Welfare Associations and individuals who have given years of study to the Indian problem strongly support the two great purposes of this bill. From long years of direct experience with the Indians I personally know that they are capable of working out economic independence, of fulfilling the civic responsibilities of American citizens, and of preserving their own distinctive culture and tradition while taking a rightful place in the midst of a white civilization. They have never had a chance to do those things. This bill gives them the chance."

(P.N. 81316)

BULLETIN

MISSION INDIAN AGENCY,
Riverside, California,
April 16, 1934

THE WHEELER-HOWARD BILL - QUESTIONS AND ANSWERS

1. Q. Will the Wheeler-Howard bill take lands away from Indians who have kept their allotments and divide it up among those Indians who have no land?

A, No. land for landless Indians will be purchased out of Federal appropriations totaling two million dollars per year authorized by title 2, section 7, of the bill, and also, if any tribe so desires, out of tribal funds. Any Indian who now owns land can keep what he has, or sell part of it to the tribe if he wishes. The provision now contained in title 3, section 8, paragraph 2, allowing the Secretary of the Interior to sell individual allotments to a tribe or community is to be amended so that such sale can take place only with the consent of the individual allottee.

2. Q. Will the Wheeler-Howard bill destroy the right of an Indian's heirs to inherit land?

A. No. on the contrary, it is the allotment system and the inheritance laws of the past which have prevented a hundred thousand Indians, now landless, from inheriting a single acre of the land which their fathers owned. Under the Wheeler-Howard bill heirship lands will no longer be sold to whites.

Where they cannot be economically divided among the Indian heirs they will be consolidated in large tracts and each heir will have his proper share in the use and rental of these tracts, his share evidenced by a corporate certificate. Improved lands, however, will not be consolidated, and the individual ownership will be undisturbed. The transfer of title to the tribe or community which is provided for in section 11 of title 3 simply prevents the sale of the land to outsiders.

It does not abridge any Indian's right of possession any more than does the retention of legal title by the United States Government.

3. Q. Does the Wheeler-Howard bill prejudice any treaty rights or claims against the Government?

A. No. Its only effect on treaty rights or claims is to insure (through section 6 of title 1) that any funds collected by a chartered Indian community can no longer be spent by the Federal Government without the consent of the tribe, as has been done with moneys recovered under treaty claims in the past.

4. Q Does the Wheeler-Howard bill attempt to send the Indian"back to the blanket?"

A. No. The bill helps the Indian to make real progress in securing for himself the greatest benefits of the white man's civilization, increased education, efficient democratic government, sound business organization, and a higher standard of living.

5. Q. Does self-government mean the segregation of the Indian?

A. No. the Indian member of a chartered community retains all rights of American citizenship, including the right to vote in Federal and State elections. Participation in an Indian community would not interfere with religious, educational, business or personal relationships outside the community any more than would a white man's participation in a village, a club, or a corporation cut him off from such religious, educational, business or personal relationships.

6. Q. Will this bill end Federal guardianship of Indians?

A. This bill specifically provides, in section 11 of title 1, that Federal guardianship of Indians and tax exemption of Indian lands shall be continued. It does offer a way in which Indians may, if they wish, bring an end to objectionable features of the present Federal guardianship by gradually assuming local control over matters which the Indian Office now handles.

7. Q. How would a chartered Indian community be able to pay its employees?

A. Where such employees perform tasks similar to those now performed by Federal employees, it is contemplated that present Federal appropriations will be continued, with only this difference: They will be paid to the Indian community instead of the Indian Office. Where employees of a chartered Indian community perform now jobs, such as the promulgation of local ordinances or the management of cooperative marketing, the Indian community will have to pay those employees out of its own income. This bill seeks to increase that income by making credit facilities

available to chartered communities, by increasing Indian lands, by giving Indian communities control over tribal funds and Federal property on the reservations, and by making it possible for such communities to engage in business and trade on an efficient and profitable basis.

8. Q. <u>How will this bill affect the Indian who has retained his trust allotment?</u>

A. This bill will protect the trust patent Indian by taking away the power of the Secretary over to grant a fee patent rendering the land taxable and alienable. The trust patent Indian can continue to possess any land he now possesses, but if he prefers he can cast his land into a larger unit and receive a share in the ownership of the whole unit, which would be profitable to all concerned, in the case of most grazing and timber lands. Not only will his possession of land continue, but the bill will make available proper credit facilities for improving and using the land, which he is now often forced to rent to outsiders for an inadequate rental. Moreover, the bill will offer him the legal protection he needs to secure, redress against trespassers and lessees who default in rentals. When he dies, his heirs will inherit special rights to his trust patent land, but the title will be placed in the tribe or community so that his heirs may not lose the land.

Where the land cannot be economically used by the various heirs, it will be put into large units, and the heirs will receive their proper shares in these units.

9. Q. <u>How will this bill effect the Indian who retains fee patent land?</u>

A. the Indian who has fee patent land, like the Indian with trust patent land, is under no compulsion to sell the land to an Indian tribe or community. He may, if he desires, if the Secretary of the Interior agrees, and if the land is unencumbered, surrender his fee patent and receive in exchange a trust patent under which his land will not be alienable or taxable, or a proportionate interest in such restricted land.

10. Q. How will this bill affect the Indian who has no land, or only a small amount of land?

A. The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members. Part of the loan fund of five or ten million dollars provided by section 13 of title 1 of the bill, as amended, will be available for improving these lands.

11. Q. How much time can the Indians take to decide whether or not to accept the self-government features of the bill?

A. If the bill is passed, each Indian tribe or community can take as much time as it wants to decide whether to accept self-government. Under the terms of the bill no charter can be forced on a group of Indians that does not want a charter.

Each group of Indians can consider the question at its leisure, with the help of private attorneys or officials of the Indian Department, before deciding

whether a program of self-government will be advantageous to the group and what kind of program it wishes. On the other hand, if the bill is not passed, Indian tribes will not be able to secure self-government if they desire it, because the Secretary of the Interior will not have the power to issue a charter of self-government.

12. **Q. What can the Indians do to help or hinder the passage of the Wheeler-Howard bill or to secure changes in it?**

A. Indians who want to see this bill passed should write to their Congressmen and Senators or to the sponsors of the bill, Congressman Howard and Senator Wheeler, or to the Commissioner of Indian Affairs, stating their opinion of the bill. Indians who object to the passage of the bill may help to defeat it by sending their objections to those individuals – or by keeping silent while the white opponents of the bill attack it.

Indians who object to certain part of the bill should work out suitable amendments and forward them to any of the individuals named above, giving the reasons for the proposed amendments.

131778

STATEMENT BY COMMISSIONER JOHN COLLIER, OF THE OFFICE OF INDIAN AFFAIRS TO THE ASSOCIATED PRESS, ON THE ATTEMPTED DESTRUCTION OF THE INDIAN REORGANIZATION ACT BY SENATE BILL 1736

****

Washington, D. C.

March 3, 1937

Senators Wheeler and Frazier have been good friends to the Indians and their cause. For this reason, their action in sponsoring an attempt to repeal the Indian Reorganization Act is mystifying. Their reasons, as reported by the Associated Press, are even more mystifying.

Neither of them has a word to say about the main positive features of the Act, which both of them voted to make into law. The Act stops the further wastage of Indian lands through allotment. It sets up an agricultural credit system for Indians. It gives Indians a preference in government employment. It establishes opportunities for advanced education for Indians. It requires protection of their lands against destructive uses resulting in deforestation and soil erosion. It sets in motion a process of re-vesting the landless Indians with land on which they can subsist. These are only some of the main positive features of the Indian Reorganization Act which Senators Wheeler and Frazier propose to destroy.

The Associated Press, interviewing them, apparently obtained no statement from either one or the other as to any of these positive features of the Act, or of the accompanying Oklahoma Indian Welfare Act, whose enactments have brought a new era to about 80 percent of the Indians. Respecting the Oklahoma Indian Act, which carries to Oklahoma the main benefits of the Indian Reorganization Act, they have nothing to say and they do not seek its repeal. But if they are to be consistent, they will attempt likewise to repeal the Oklahoma Act.

Their reasons, as quoted by the Associated Press, are partly irrelevant and partly inaccurate.

Senator Wheeler is quoted as objecting that features stricken from the original Wheeler-Howard Bill are nevertheless being put into effect by the Secretary of the Interior through constitutions granted to the tribes which have organized under the Act. But the Act expressly states that the powers vested in Indian tribes through their constitutions may be not only those specified powers named in the Act but "in addition, all powers vested in any Indian tribe or tribal council by existing law." The "existing law," as it stood before the Indian Reorganization Act was signed, gave to the Department certain powers to vest authority in tribes, and directly vested certain authorities in tribes. The Indian Reorganization Act extended these authorities and limited the authority of the Department. Why has it been wrong for the Secretary of the interior to obey the express language of the Indian Reorganization Act, and to vest the tribes with all those authorities given by prior acts as well as by the Reorganization Act?

Senator Frazier, as quoted by the Associated Press, voices a criticism which seem to be exactly the opposite of Senator Wheeler's. He is quoted as stating that a majority of the Indians have complained that instead of getting more self-government through the Act, they were getting less self-government. This could only mean that the constitutions granted to the tribes, instead of going beyond the scope of the Indian Reorganization Act in their grant of powers, as alleged by Senator Wheeler, have withheld from the tribes even those powers contained in the Reorganization Act. The allegation is not supported by the facts, nor is it accurate to state that the majority of the Indians, or even any substantial minority of them, have complained that they were being dictated to. Actually, out of 230 tribes, 170 adopted the Act by majority votes, and are subsisting under it; none of them has asked that it be repealed; and many of the tribes which voted not to accept the Act are now desirous of being permitted to vote once more upon it, in order to get its protections and benefits.

Senator Frazier makes another statement, as quoted, to the effect that Indians who did not accept the Reorganization Act have been discriminated against and specifically, have been punished by being removed from relief rolls. Senator Frazier states that there have been such complaints. He does not state that they are true. Such complaints, if made, are in fact grossly untrue.

The expenditure of emergency funds for Indian tribes has been carried out with no relation whatsoever to the Indian Reorganization Act., The expenditures of regular funds have been carried out as specifically

directed by congress. Tribes not under the Act have received in many instances greater quotas of the emergency moneys of all sorts than tribes under the act. Indian relief has been expended according to available funds, human need, and the opportunity to expend the funds usefully upon Indian-owned land.

Even were Senator Frazier's allegations, as quoted, supported by fact, they would provide no reason whatsoever for seeking repeal of the Indian Reorganization Act. There would be criticisms directed against administration, and correction logically would be sought through demanding administrative reforms.

The existence of the facts is denied. But if they did exist, they would furnish no justification for an attempt to destroy the Indian Reorganization Act with its grants for protection of Indian property, new land, credit, improved education, and all those other benefits which have made the Act the foundation of a new and more hopeful life among the Indians.

In my opinion there is no chance that the bill introduced by Senators Wheeler and Frazier will be passed by Congress or if passed, signed by the President

JOHN COLLIER

Commissioner of Indian Affairs.

17c

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

10/16/39

The following list shows Indian tribes, grouped by states, which are under Constitutions and Charters, as approved by the Secretary of the Interior in accordance with the provisions of the Indian Reorganization Act, the Oklahoma Indian Welfare Act, and the Alaska Act. The listed dates show when the Constitutions and Charters went into effect.

Nº	Reservation	Official Name	Constitution Approved	Charter Ratified	Tot. Pop.
	Arizona				
1	San Carlos	The San Carlos Apache Tribe	1/17/36		3017
2	Pima	The Gila River Pima-Maricopa Indian Community	5/14/36	2/28/38	4586
3	Ft McDowell	The Ft. McDowell Mahave-Apache Community	11/24/36	6/6/38	195
4	Hopi	The Hopi Tribe	12/19/36		3325
5	Gila Bend, San Xavier, Sells	The Papago Tribe	1/6/37		5656
6	Camp Verde	The Yavapai-Apache Indian Community	2/12/37		419
7	Colorado River	The Colo. River Indian Tribes of the Colo. River Reservation, Arizona and California	8/13/37		1212
8	Ft. Apache	The White Mountain Apache Tribe	8/26/38		2811
9	Hualapai	The Hualapai Tribe of the Hualapai Reservation	12/17/38		459

10	Havasupai	The Havasaupai Tribe of the Havasupai Reservation	3/27/39		207
				Total	21887
	California				
1	Big Valley	The Big Valley Band of Pomo Indians of the Big Valley Rancheria	1/15/36		92
2	Upper Lake	The Upper Lake Band of Pomo Indians of the Upper Lake Rancheria	1/15/36		72
3	Wilton	The Me-wuk Indian Community of the Wilton Rancheria	1/15/36		28
4	Tule River	The Tule River Indian Tribe	1/15/36		196
5	Tuolumne	The Tuolumne Band of Me-wuk Indians of the Tuolumne Rancheria	1/15/36	11/12/37	80
6	Ft. Bidwell	The Fort Bidwell Indian Community	1/28/36		128
7	Stewart's Point	The Kashia Band of Pomo Indians of the Stewart's Point Rancheria	3/11/36		140
8	Manchester	The Manchester Band of Pomo Indians of the Manchester Rancheria	3/11/36	2/27/37	92

9	Round Valley	The Covelo Indian Community	12/16/36	11/6/37	838
10	Ft. Yuma	The Quechan Tribe	12/18/36		852
11	Quartz Valley	The Quartz Valley Indian Community	6/15/39		29
				Total	2547
	Colorado				
1	Southern Ute	The Southern Ute Tribe of the Southern Reservation	11/4/36	11/1/38	403
	Idaho				
1	Ft. Hall	The Shoshone-Bannock Tribes of the Fort Hall Reservation	4/30/36	4/17/37	1847
	Iowa				
1	Sac & Fox	The Sac & Fox Tribe of the Mississippi in Iowa	12/20/37		460

	Kansas				
1	Iowa	The Iowa Tribe in Nebraska & Kansas	2/26/37	6/19/37	537
2	Kickapo	The Kickapo Tribe in Kansas	2/26/37	6/19/37	342
3	Sac & Fox	The Sac & Fox Tribe of Missouri	3/2/37	6/19/37	127
				Total	1006
	Michigan				
1	Hannahville	The Hannahville Indian Community	7/23/36	8/21/37	108
2	Bay Mills	The Bay Mills Indian Community	11/4/36	11/27/37	`09
3	L'Anse	The Keweenaw Bay Indian Community	12/17/36	7/17/37	1116
4	Isabella	The Saginaw Chippewa Indian Tribe of Michigan	5/6/37	8/28/37	800
				Total	2133
	Minnesota				
1	Lower Sioux	The Lower Sioux Indian Community in the State of Minnesota	6/11/36	7/17/37	192
2	Prairie Island	The Prairie Island Indian Community in the State of Minnesota	6/20/36	7/23/37	94

3	Consolidated Chippewa	The Minnesota Chippewa Tribe	7/24/36	11/13/37	13232
				Total	13518
	Montana				
1	Flathead	The Confederated Salish and Kootenai Tribes of the Flathead Reservation	10/28/35	4/25/36	3114
2	Rocky Boy's	The Chippewa Cree Tribe of the Rocky Boy's Reservation	11/23/35	7/25/36	672
3	Tongue River	The Northern Cheyenne Tribe	11/23/35	11/7/36	1573
4	Blackfeet	The Blackfeet Tribe of the Blackfeet Indian Reservation	12/13/35	8/15/36	4348
5	Ft. Belknap	The Ft. Belknap Indian Community	12/13/35	8/25/37	1540
				Total	11247
	Nebraska				
1	Omaha	The Omaha Tribe of Nebraska	3/30/36	8/22/36	1700
2	Ponca	The Ponca Tribe of Native Americans	4/3/36	8/15/36	391
3	Santee	The Santee Sioux Tribe of Nebraska	4/3/36	8/22/36	1290
4	Winnebago	The Winnebago Tribe of Nebraska	4/3/36	8/15/36	1238

				Total	4619
	Nevada				
1	Reno-Sparks	The Reno-Sparks Indian Colony	1/15/36	1/7/38	190
2	Pyramid Lake	The Pyramid Lake Paiute Tribe	1/15/36	1/7/38	190
3	Washoe	The Washoe Tribe	1/24/36	2/27/37	150
4	Western Shoshone	The Shoshone-Paiute Tribes of the Duck Valley Reservation	4/20/36	8/22/36	545
5	Ft. McDermott	The Ft. McDermott Paiute and Shoshone Tribe	7/2/36	11/21/36	258
6	Yerington	The Yerington Paiute Tribe	1/4/37	4/10/37	134
7	Walker River	The Walker River Paiute Tribe	3/26/37	5/8/37	501
8	Te-Moak	The Te-Moak bands of Western Shoshone Indians	8/24/38	12/12/38	80
				Total	2417
	New Mexico				

1	Santa Clara	The Pueblo of Santa Clara	12/20/35		450
2	Mescalero	The Apache Tribe of the Mescalero Reservation	12/25/36	8/1/36	762
3	Jicarilla	The Jicarilla Apache Tribe of New Mexico	8/4/37	9/4/37	727
	North Dakota				
1	Ft. Berthold	The Three Affiliated Tribes of the Fort Berthold Reservation	6/29/36	4/24/37	373
	Oregon				
1	Grand Ronde	The Confederated Tribes of the Grand Ronde Community	5/13/36	8/22/36	373
2	Warm Springs	The Confederated Tribes of the Warm Springs Reservation	2/14/38	4/23/38	779
	Oklahoma				

1	Seneca-Cayuga	The Seneca-Cayuga Tribe of Oklahoma	4/2/6/37	6/26/37	748
2	Wyandotte	The Wyandotte Tribe of Oklahoma	7/17/37	10/30/37	786
3	Cheyenne and Arapaho	The Cheyenne-Arapaho Tribes of Oklahoma	8/25/37		2848
4	Kickapoo	The Kickapoo Tribe of Oklahoma	9/18/37	1/18/38	262
5	Iowa	The Iowa Tribe of Oklahoma	10/23/37	2/7/38	977
6	Sac & Fox	The Sac & Fox Tribe of Indians of Oklahoma	12/7/37		875
7	Pawnee	The Pawnee Indians of Oklahoma	1/6/38	4/28/38	977
8	Caddo	The Caddo Indian Tribe of Oklahoma	1/17/38	11/15/38	993
9	Tonkawa	The Tonkawa Tribe of Indians of Oklahoma	4/21/38		52
10	Ottawa	The Ottawa Tribe of Oklahoma	11/30/38	6/2/39	426
11	Absentee-Shawnee	The Absentee Shawnee Tribe of Indians of Oklahoma	12/5/38		653
12	Potawatomi	The Citizen band of Potawatomi Indians of Oklahoma	12/12/38		2627
13	Thlopthlocco	Thlopthlocco Tribal Town	12/27/38	4/13/39	380

14	Alabama-Quassarte	The Alabama-Quassarte Tribal Town	1/10/39	5/24/39	150
15	Miami	The Miami Tribe of Oklahoma	1/10/39		287
16	Peoria	The Peoria Tribe of Indians of Oklahoma	10/10/39		372
	<u>South Dakota</u>				
1	Lower Brule	The Lower Brule Sioux Tribe	11/27/35	7/11/36	613
2	Rosebud	The Rosebud Sioux Tribe	12/20/35	3/16/37	6752
3	Cheyenne River	The Cheyenne River Sioux Tribe	12/27/35		3490
4	Pine Ridge	The Oglala Sioux Tribe of the Pine Ridge Reservation	1/15/36		8776
5	Flandreau	The Flandreau Santee Sioux Tribe	4/24/36	10/31/36	348
				Total	19979
	<u>Texas</u>				
1	Alabama-Coushatta	The Alabama-Coushatta Tribes of Texas	8/19/38		326

		Utah				
	1	Uintah & Ouray	The Ute Indian Tribe of the Uintah and Ouray Reservation	1/19/37	8/10/38	1304
		Washington				
	1	Tulalip	The Tulalip Tribes	1/24/36	10/3/36	673
	2	Swinomish	The Swinomish Indian Tribal Community	1/27/36	7/25/36	302
	3	Puyallup	The Puyallup Tribe	5/13/36		319
	4	Muckleshoot	The Muckleshoot Indian Tribe	5/13/36	10/31/36	193
	5	Makah	The Makah Indian Tribe	5/16/36	2/27/37	408
	6	Quileute	The Quileute Tribe of the Quileute Reservation	11/11/36	8/21/37	286
	7	Skokomish	The Skokomish Indian Tribe of the Skokomish Reservation	5/3/38	7/22/39	211
	8	Kalispel	The Kalipsel Indian Community of the Kalispel Reservation	3/24/38	5/28/38	97

9	Port Gamble	The Port Gamble Indian Community	9/7/39		192
				Total	2681
	Wisconsin				
1	Red Cliff	The Red Cliff Band of Lake Superior Chippewa Indians	6/1/36	10/24/36	624
2	Bad River	The Bad River band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin	6/20/36	5/21/38	1215
3	Lac du Flambeau	The Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin	8/15/36	5/8/37	877
4	Oneida	The Oneida Tribe of Indians of Wisconsin	12/21/36	5/1/37	3249
5	Wisconsin Potawatomi	The Forest County Potawatomi Community	2/6/37	10/30/37	301
6	Stockbridge	The Stockbridge-Munsee Community	10/30/37	5/21/38	600
7	Mole Lake	The Sokaogon Chippewa Community	11/9/38	10/7/39	187
				Total	7053
			Grand	Total	110791

28c

1	Hydaburg	The Hydaburg Cooperative Association of Alaska	4/14/38	4/14/38	329
2	Klawock	The Klawock Cooperative Association of Alaska	10/4/38	10/4/38	277
3	Craig	The Craig Community Association of Craig Alaska	10/8/38	10/8/38	201
4	Sitka	The Sitka Community Association of Craig Alaska	10/11/38	10/11/38	620
5	Kasaan	The Organized Village of Kasaan	10/15/38	10/15/38	83
6	King Island	The King Island Native Community	1/31/39	1/31/39	192
7	Atka	The Native Village of Taka	5/23/39	5/23/39	91
8	Nikolski	The Native Village of Niolski	6/12/39	6/12/39	87
9	Wales	The Native Village of Wales	7/29/39	7/29/39	189
10	Shishmaref	The Native Village of Shishmaref	8/2/39	8/2/39	235
10	Karluck	The Native Village of Karluck	8/23/1939	8/23/39	192
				Total	2496

AMICUS CURIAE BRIEF

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SUPREME COURT, U.S.

No. 07-526

IN THE

Supreme Court of the United States

DONALD L. CARCIERI,
GOVERNOR OF RHODE ISLAND, ET AL.,
Petitioners,

v.

DIRK KEMPTHORNE, SECRETARY OF INTERIOR, ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

DAN M. KAHAN
TERRI-LEI O'MALLEY
YALE LAW SCHOOL
SUPREME COURT CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-3800

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to take land into trust for the benefit of tribes that were not federally recognized at the time it was enacted.

2. Whether the Rhode Island Settlement Act permits the Secretary to take non-settlement land into trust for the Narragansett Tribe.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iiii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE IRA AUTHORIZES THE SECRETARY TO TAKE LAND INTO TRUST ONLY FOR THE BENEFIT OF TRIBES THAT WERE FEDERALLY RECOGNIZED AT THE TIME OF ITS ENACTMENT. 3

A. The IRA Was Intended To Remediate Harm Caused To Tribes By Allotment Programs Authorized Under The Dawes Act. 3

B. Congress Intended The IRA To Apply Only To Tribes That Were Recognized At The Time Of Its Enactment. 6

II. THE RHODE ISLAND SETTLEMENT ACT DOES NOT PERMIT THE SECRETARY TO TAKE NON-SETTLEMENT LAND INTO TRUST FOR THE NARRAGANSETTS. 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Charlestown v. *United States*, 696 F. Supp. 800 (D.R.I. 1988) 11
City of Sherrill v. *Oneida Indian Nation*, 544 U.S. 197 (2005) 1
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Waldron v. *United States*, 143 Fed. 413 8

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25 U.S.C. § 472 10
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25 U.S.C. § 477 8
25 U.S.C. § 478-1 8
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25 U.S.C. § 1708(a) 12
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Page(s)

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25 U.S.C. § 1775d(a) 16
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Page(s)

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the two issues presented in this case.

Disputes over the ownership of and sovereignty over land claimed by tribes have spawned much litigation and called into question title to property in many jurisdictions. Several state and local governments accordingly have entered into agreements with tribes, subsequently codified by Congress, in an attempt to resolve these disputes. The decision below, however, raises doubts about the finality of these settlements. In addition, by allowing the Secretary to restore tribal sovereignty over property that had long been subject to state and local control, the judgment below denies petitioners essential regulatory authority, which could "seriously burden the administration of state and local governments and . . . adversely affect landowners neighboring the tribal patches." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005). *Amici* accordingly submit this brief to assist the Court in the resolution of this case.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

I. Nineteenth-century federal policy toward Indian tribes was based on assimilation of Indians into the American mainstream. The Dawes Act, 25 U.S.C. §§ 331-333, converted tribal land ownership to private ownership through the allotment of land to individual Indians. This policy was a profound failure, with devastating consequences for Indian land ownership. Fully two-thirds of the Indian treaty land base, about 90 million acres, was lost through allotment. The devastation this policy wrought on Indian communities caused a tectonic shift in federal Indian policy away from assimilation to fostering tribal autonomy.

The failure of the Dawes Act led directly to the passage of the Indian Reorganization Act of 1934. Congress intended the IRA to be a first step in reversing Indian policy by, in part, allowing the Secretary to take land into trust for the benefit of tribes that had been adversely affected by the Dawes allotment policy. But given this goal, the IRA necessarily was directed only at tribes that had been affected by the allotment policy – that is, tribes (unlike the Narragansetts) that had a reservation and were federally recognized at the time IRA was enacted. The policy and fundamental goals of the IRA compel the conclusion that the statute benefits only tribes that were recognized in 1934.

II. Congress prohibited the Secretary from taking land into trust for the benefit of the Narragansetts when it enacted the Rhode Island Settlement Act. Rhode Island's Settlement Act was the first of several similar statutes, virtually all of which maintain state jurisdiction over settlement land. The Secretary's reading of the Rhode Island Act, which allows

for real property to be converted into tribal land subject to tribal jurisdiction, departs radically from this legislative policy, threatens to undermine longstanding settlements of state-tribal land disputes, and ignores Congress's great sensitivity to the maintenance of state jurisdiction.

ARGUMENT

I. THE IRA AUTHORIZES THE SECRETARY TO TAKE LAND INTO TRUST ONLY FOR THE BENEFIT OF TRIBES THAT WERE FEDERALLY RECOGNIZED AT THE TIME OF ITS ENACTMENT.

A. The IRA Was Intended To Remediate Harm Caused To Tribes By Allotment Programs Authorized Under The Dawes Act.

1. Until the 1850s, the Federal Government supported the right of Indian tribes to maintain treaty lands and determine, on the tribal level, the political and social practices that would govern on those lands. But as public opinion began to favor assimilation, full private ownership of parcels of land by individual Indians was viewed as a crucial step in the process.[2] Federal assimilation policy culminated in 1887 with passage of the General Allotment Act, also known as the Dawes Act. 24 Stat. 388, §§ 1-3 (formerly codified at 25 U.S.C. §§ 331-333).

The Dawes Act provided that "*in any reservation* created for [Indian] use," Congress or the President

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[2] "Individual land ownership was supposed to have some magic in it to transform an Indian hunter into a busy farmer." Delos S. Otis, *The Dawes Act and the Allotment of Indian Lands* 141 (Francis Paul Prucha ed., 1973).

were authorized "to allot the lands in said reservation in severalty to any Indian located thereon." 49 Cong. Ch. 119 (emphasis added); 24 Stat. 388. This policy effectively forced tribal members "to surrender their undivided interest in tribally owned common estate." Felix S. Cohen, *Handbook of Federal Indian Law* § 16.03 (1982 ed.). After 25 years, Indian lands could be sold to non-Indians. 49 Cong. Ch. 119, 24 Stat. 390. See also *Handbook of Federal Indian Law* § 16.03. All told, 118 reservations were allotted under the authority of the Dawes Act, 44 of which were opened to non-Indian homesteading. American Indian Policy Review Commission, *Final Report* 309 (1977).

Even the limited protection afforded by the 25 year waiting period was attacked by land speculators and critics of federal guardianship as a means of achieving assimilation.[3] Congress responded by amending the Dawes Act to authorize the early issuance of fee patents by the Secretary of the Interior. Burke Act of 1906, 34 Stat. 182 (amending § 6 of the Dawes Act) (codified at 25 U.S.C. § 349). As a result, 27 million patented acres were sold to non-Indians. *Handbook of Federal Indian Law* 138.

Prior to the Dawes Act, treaty and reservation land held by Indians totaled 138 million acres. Forty-seven years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands. Office of Indian Affairs, U.S. Department of the Interior, Report on Land Planning 6 (GPO 1935); see also Wilcomb Washburn, *Red Man's Land, White Man's Law* 145 (1995). The Department of the Inte-

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[3] Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* 165 (1984).

rior estimated that 95% of the allotted reservation land would be sold to non-Indians, *id.* at 6, while other findings calculated the amount of allotted land remaining in Indian ownership at 3%. American Indian Policy Review Commission, *Final Report* 309.[4]

2. This wholesale loss of tribal land ignited calls for a federal response. *Hearings on H.R. 7902 before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934). Congress took up consideration of the IRA with the specific aim of ending allotments and undoing its effects. See H. Rep 1804, 73d Congress, 2d Session (May 28, 1934) ("The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted ways with 90,000,000 acres of their land in the last 50 years. . . . To make many of the now pauperized, landless Indians self-supporting, it authorizes a long term program of purchasing land for them."); S. Rep 1080, 73d Congress, 2d Session (May 10, 1934) ("Under the operations of allotment, the land holdings of Indians have steadily dwindled and a considerable number of Indians have become entirely landless. By section 1 of [this] bill, future allotment in severalty to Indians is prohibited. . . .").

As Indian Commissioner John Collier wrote, "[t]he Wheeler Howard Act . . . endeavors to provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries." Annual Report of the Secretary of the Interior, 1934, 78-83. Collier

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[4] See also Wilcomb Washburn, *Red Man's Land/White Man's Law* 145 (2d ed. 1995); U.S. Dep't of Interior, 10 Rep. on Land Planning 6 (GPO 1935).

continued: "[the] result of the allotment system brings about the forced sale of Indian heirship lands, usually to white buyers. . . . [The] Wheeler-Howard Act is taking the first hesitant step toward the solution of this problem." *Id.* The IRA was thus specifically directed at providing assistance to those tribes that had been harmed by the Dawes Act, i.e., those federally recognized tribes that, prior to 1934, had reservation lands subject to allotment.

B. Congress Intended The IRA To Apply Only To Tribes That Were Recognized At The Time Of Its Enactment.

Against this background, the IRA limited its benefits, in relevant part, to "any recognized Indian tribe now under federal jurisdiction." 25 U.S.C. § 479. The question is whether Congress's use of the term "now" limits the Secretary's authority to take land into trust to tribes recognized when the IRA was adopted. The answer is that it does. The IRA's goal was to reverse the allotment policy that had been directed only at the reservation lands of recognized tribes then under federal jurisdiction; Congress accordingly could not have expected the IRA to apply to tribes that had not been subject to this policy. This construction is confirmed by related provisions of the IRA, all of which point to the conclusion that the tribes identified by the statute were those recognized at the time of enactment.

1. In arguing to the contrary, the Secretary repeats the reasoning of the court below that "now" is ambiguous. Opp. 6. But this Court's recognition in *United States* v. *John*, 437 U.S. 634, 650 (1978), that Congress intended "now" to mean "in 1934" is compelled by the history of the IRA. As noted above, the Dawes Act provided for allotment only of land "in

any reservation created for [Indian] use." The IRA was intended to counteract the harms inflicted by this policy. It would entirely distort Congress's intent in enacting the IRA to apply it to tribes that had not been recognized by the United States, and did not have a reservation subject to allotment, at the time the Dawes Act was in effect.

2. This conclusion is confirmed in several ways by the IRA's structure. *First*, the IRA contained a one-year time limit for tribes to accept or reject the Act: "[t]his Act shall not apply to any reservation wherein a majority of adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, *within one year after the passage and approval of this Act*, to call such an election..." S. 3645, 73d Congress, Sess. II, Ch. 576, June 18, 1934 (emphasis added).[5] Congress soon extended this deadline, but precisely limited the time period within which a tribe could accept the IRA. Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378 (extending the time for holding elections from June 18, 1935 to June 18, 1936).[6] Once more eligibility for

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[5] The one-year period was the result of considerable debate and eventual compromise between the House and Senate (the House proposed six months, while the Senate favored one year). That the question of the cut-off date required debate further suggests it was a matter of some consequence. Had lawmakers not viewed this time limit as final, it is unlikely they would have attached such importance to its precise length. See H. Rep. 1090, 73d Congress, 2d Session (May 28, 1934).

[6] Others to consider the Act's eligibility provisions have concluded that eligibility to opt into the IRA ended upon the conclusion of the additional year set forth under § 2, 49 Stat. 378. "During the two-year period within which tribes could accept or reject the IRA, 258 elections were held." Comment, *Tribal Self-*

the IRA's benefits was tied to the date of its enactment.[7] In this context, the congressional expectation necessarily would have been that the IRA would apply only to tribes that were recognized – and in a position to vote on the IRA's application – at the time that the statute went into effect.

Second, Congress tied eligibility to participate in the IRA scheme to connection with a reservation. Only Indians who resided on a reservation and had a legal interest in its affairs were eligible to vote on the question whether to accept or reject the IRA. Such a legal interest included "any property holding on the reservation, entitlement to participate in tribal elections or other tribal affairs on a given reservation, and receipt of benefits of any sort from the representatives of the Interior Department stationed on a given reservation." Legal Opinions of the Solicitor of the Interior Relating to Indian Affairs 1917-1974 Vol. I, 1170 (citing *Waldron* v. *United States*, 143 Fed. 413). This restriction on voter eligibility demonstrates Congress's intent to extend coverage under the IRA only to those tribes federally recognized and possessing a reservation prior to the acceptance deadline.

Third, by its plain terms the IRA does not have universal application and expressly denies coverage to some tribes. For example, Section 13 provides that the Act does not apply to territories or other possessions of the United States, except that five sections

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Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 965, 972 (1972).

[7] Two provisions of the IRA apply even to tribes that did not or could not vote to accept the IRA: its restriction on alienation (§ 462) and the authority of the Secretary to issue a charter to tribes on petition (§ 477). See 25 U.S.C. § 478-1.

apply to Alaska. 25 U.S.C. § 473; see also, S. 3645, 73d Congress, Sess. II, Ch. 576, June 18, 1934. Six separate sections do not apply to specified tribes in Oklahoma.[8] *Id.* Commissioner Collier expressed the "hope[ ] that the next Congress will enact legislation designed to finally settle all Indian claims in the shortest possible time . . . ." Annual Report of the Secretary of the Interior, 1934, 73-83. There accordingly is nothing anomalous in the conclusion that the IRA does not provide a means of addressing any and all Indian land claims.

Fourth, language elsewhere in the IRA strongly suggests that Congress meant "now" to refer only to the time of enactment. In several provisions of the statute, for example, Congress used the phrase "now or hereafter" when describing future developments. See 25 U.S.C. § 468 ("Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation *now* existing or established *hereafter*.") (emphasis added); *id.* § 472 ("The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, *now or hereafter*, by the Indian Office, in the administration of functions or services affecting any Indian tribe.") (emphasis added); see also *id.* ("Such qualified Indians shall *hereafter* have the pre-

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[8] The first version of the bill that became the IRA contained an exemption for New York Indians that was debated but ultimately not included in the final version. *Hearings on S. 2755 before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. (1934); *Hearings on H.R. 7902 before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934).

ference to appointment to vacancies in any such positions") (emphasis added). The "hereafter" reference would have been superfluous if, as the Secretary contends, "now" means "whenever."

Similarly, one of the alternative definitions of "Indian" in Section 19 refers to persons who are "descendants of . . . members [of any recognized Indian tribe now under federal jurisdiction] who were, on June 1, 1934, residing within the *present* boundaries of any Indian reservation." 25 U.S.C. § 479 (emphasis added). This formulation is most naturally read to reflect the understanding that the statute refers to tribal recognition accorded as of June 1, 1934. All of the indicia of congressional intent accordingly are of a piece: Congress intended the Secretary to have authority to take land into trust only for the benefit of tribes that had been recognized by the Federal Government at the time of the IRA's enactment.

3. When the IRA was enacted, the Narragansetts did not have a reservation. Indeed, in 1880 the Rhode Island legislature dissolved the Narragansetts Tribe and ended tribal jurisdiction over 927 acres of land.[9] The Rhode Island Supreme Court denied at-

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[9] "From and after the passage of this act, the tribal authority of the Narragansett tribe of Indians shall cease, except for the purpose of carrying the provisions of this act into full effect; and all persons who may be members of said tribe shall cease to be members thereof, except as aforesaid, and shall thereupon and thereafter be entitled to all the rights and privileges, and be subject to all the duties and liabilities to which they would have been entitled or subject had they never been members of said tribe..." § 9, Chapter 800 of the Public Laws of Rhode Island, passed March 31st, 1880, cited in *In re Narragansett Indians*, 40 A. 347. See also Albert S. Gatschet, "Narragansett Vocabulary Collected in 1879," 39 *International Journal of American Linguistics* 14 (Jan. 1973); William Scranton Simmons, *Spirit of*

tempts at legal redress in 1898. *In re Narragansett Indians*, 40 A. 347 (R.I. 1898) ("The political officers of the United States seem never to have recognized the existence of such a tribe as the Narragansett; and hence these Indians are not a tribe with which Congress, by the constitution of the United States, is empowered to regulate commerce. . . ."). Although this may have been a violation of the Non-Intercourse Act of 1790, the Federal Government refused to intervene because the Narragansetts had never signed a treaty with the United States. See *Charlestown* v. *United States*, 696 F. Supp. 800, 802-03 (D.R.I. 1988). The Narragansetts were unable to regain their reservation until the settlement of the lengthy lawsuit that underlies this case.

Lacking a reservation or recognized Indian title to land, the Narragansetts were not subject to the Dawes Act. And having suffered no harm under the Dawes Act, the Narragansetts could not have been within the intended scope of the IRA. The judgment of the court of appeals should accordingly be reversed.

II. THE RHODE ISLAND SETTLEMENT ACT DOES NOT PERMIT THE SECRETARY TO TAKE NON-SETTLEMENT LAND INTO TRUST FOR THE NARRAGANSETTS.

The conclusion that the IRA does not provide the Secretary the authority to take land into trust for the benefit of the Narragansetts suffices to resolve this case. But even if the Secretary had such authority,

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the New England Tribes: History and Folklore, 1620 – 1984, 30 (1986). See also Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated July 29, 1982, at 4, available at http://64.62.196.98/adc/Nar/V001/D007.TIF.

Congress prohibited him from using it when it enacted the Rhode Island Settlement Act.[10]

1. As petitioners explain, the Settlement Act was Congress's ratification of an agreement negotiated among federal, state, and tribal officials to settle land disputes arising under the Non-Intercourse Act. This agreement, memorialized in a Joint Memorandum of Understanding, S. Rep. 95-972, 25-30 (1978) (JMOU), provided for title to 1800 acres of land in Rhode Island to be transferred to the Narragansetts (Settlement Land). Half of the Settlement Land had been state-owned and half was purchased for the Tribe with federal funds. In return for Rhode Island's relinquishment of title to 900 acres of its land, the State retained civil, criminal and regulatory jurisdiction over the entirety of the Settlement Land, JMOU § 13; 25 U.S.C. § 1708(a), and the Tribe consented to the extinguishment of any aboriginal title it held in any land within the State. JMOU § 6; 25 U.S.C. § 1712.[11]

There can be little doubt that all parties to the agreement believed that the JMOU as codified in the Settlement Act would permanently settle all land claims of the Narragansetts in Rhode Island. In his statement to Congress describing the Settlement Act, the U.S. Representative from Rhode Island, Edward

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[10] Since the Narragansetts were not federally recognized at the time of passage of the Rhode Island Settlement Act, a State Corporation acted on behalf of the Tribe.

[11] Other concessions by the parties include the State's exempting Settlement Lands from local property tax, JMOU § 9; 25 U.S.C. § 1715, and the Tribe's covenant that all Settlement Land contributed by the State would be permanently held for conservation purposes. JMOU § 12.

P. Beard, stated: "This bill will resolve all Indian land claims and it will do so to the satisfaction of all parties." *Rhode Island Indian Claims Settlement Act: Joint Hearing on S. 3153 and H.R. 12860 before the U.S. S. Select Comm. on Indian Affairs and the U.S. H. R. Comm. on Interior and Insular Affairs Subcomm. on Indian Affairs and Pub. Lands*, 95th Cong. 90 (1978) (statement of Edward P. Beard, U.S. Rep. from Rhode Island). Tribal Secretary Eric Thomas, expressing the views of the Narragansetts, told Congress,

> We wholly support S. 3153 and H.R. 12860. These bills embody a settlement to which our tribe agreed and, if enacted, will put an end to a 98-year struggle to regain reservation lands torn from us in 1880 when the State of Rhode Island attempted to terminate our tribal existence. Enactment of these bills will help to insure the continued survival of our people and open the door for a new age of mutual understanding and trust between our people and our neighbors.

Id. at 112.

2. The court below nevertheless held, and the Secretary now argues, that the Settlement Act did not affect the Secretary's authority to take land into trust for the Narragansetts, thus essentially restoring tribal sovereignty over the property. Petitioners show why this assertion cannot be reconciled with the language and manifest purpose of the Settlement Act. But in considering the Secretary's argument, the Court also should be mindful of an additional consideration: Rhode Island's Settlement Act was the first of, and the model for, other settlement acts that resolved disputes over land ownership and tri-

bal sovereignty. All use similar language and structure, and show Congress's great sensitivity to the maintenance of state jurisdiction. The Secretary's reading of the Rhode Island Settlement Act departs radically from Congress's approach and threatens to undermine long-settled resolutions of contentious property disputes in other States.

The States have generally declined to cede any jurisdiction over land that a tribe acquired pursuant to a settlement act. To the contrary, the acts that followed Rhode Island's and that explicitly define the jurisdictional relationship between State and tribe[12] do not yield full authority over settlement land to the tribe and rarely suggest that greater tribal jurisdiction may be achieved over non-settlement land.[13]

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[12] Certain acts do not reference jurisdictional questions because of the nature of the dispute and settlement, such as the Miccosukee Settlement Act II, 25 U.S.C. § 1750, *et seq.*, (resolving specific litigation over the construction of a section of Interstate 95) and the Crow Lands Settlement Act, 25 U.S.C. § 1776, *et seq.* (resolving a boundary dispute arising from a faulty survey). The Seneca Settlement Act, 25 U.S.C. § 1774, *et.seq.*, correcting and renewing leases established in the early 20th century, characterizes the land only as being held by the tribe in "restricted fee" status, and does not address broader jurisdictional questions. The Santo Domingo Pueblo Settlement Act, 25 U.S.C. § 1777, *et seq.*, states only that land will be held in trust by the Secretary and "shall be treated as Indian country within the meaning of section 1151 of title 18."

[13] See, e.g., 25 U.S.C. § 1746 (Florida's settlement with the Miccosukee provides that "[n]othing shall diminish, modify or otherwise affect the extent of the civil and criminal jurisdiction of the State" in the leased area; state jurisdiction is assumed over trust lands conveyed by Florida to the United States for the Miccosukee); 25 U.S.C. § 1771e (Massachusetts' settlement with the Wampanoag explicitly preserves full state civil and criminal jurisdiction within the town of Gay Head, where the

The Secretary's extraordinary claim that he may take land purposefully excluded from the Settlement Act into trust and grant full and exclusive jurisdiction to the Narragansetts over that land is therefore both highly unusual and contrary to Congress's re-

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settlement land is located); 25 U.S.C. § 1772d(1) (maintaining Florida's full criminal and civil jurisdiction on Seminole settlement land "to the same extent the State has jurisdiction over said offenses committed elsewhere within the State"); 25 U.S.C. §§ 1725a, 1725(b)(1); 30 M.R.S. §§ 6209-A & 6209-B (Maine's settlement with the Passamaquoddy and the Penobscot tribes establishes exclusive jurisdiction for the tribes over certain minor criminal matters, child custody proceedings, and other domestic relations matters; Maine retains full state criminal and civil jurisdiction over "all Indians, Indian nations, or tribes or bands of Indians in the State of Maine ... and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States ... to the same extent as any other person or land therein."); 25 U.S.C. § 941h (South Carolina Catawba Settlement Act provides for the creation of a tribal court with criminal jurisdiction over misdemeanors and other petty offenses and civil authority over contracts and torts related to the reservation land, while the State retains both concurrent jurisdiction over these matters and exclusive jurisdiction otherwise; land owned by the Catawba Tribe remains subject to criminal, civil and regulatory laws of the State "to the same extent as any other person, citizen, or land in the State"); 25 U.S.C. § 1773(g) (allowing Washington and its political subdivisions to retain and exercise jurisdiction concurrently with the Puyallup Tribe)

So far as *amici* are aware, only one settlement act, Connecticut's settlement with the Mohegan, permits a tribe to retain exclusive tribal civil jurisdiction over settlement land. H. Rep. 103-676. In that case, the tribe's jurisdiction existed prior to the settlement act. Even then, Connecticut maintains concurrent criminal jurisdiction. 25 U.S.C. § 1775d(a). This Act does not provide for tribal jurisdiction of any sort over non-settlement land.

spect for state jurisdiction.[14] Moreover, the Secretary's position is contrary to the great sensitivity that Congress has consistently shown to state jurisdiction.

Rather than asserting jurisdiction not created by the Settlement Act, the Tribe would be better served by approaching Congress if it now finds the Settlement Act irksome, as three other tribes have done. In Maine, the Houlton Band of Maliseet Indians reached a modified settlement with Maine through a supplementary act, PL 99-566, 100 Stat. 3184, six years after passage of the original Settlement Act; the legislation addressed the fund and land acquisition program administered by the Secretary for the Tribe's benefit. The Aroostook Band of Micmacs, one not originally benefited in the Maine Settlement Act, obtained a similar program through separate state and congressional legislation in 1991. PL 102-171, 105 Stat. 1143. And the Miccosukee Tribe, after reaching a settlement with Florida in 1982, sought and obtained a separate amending act in 1997, 25 U.S.C. § 1750, to resolve an ongoing dispute between the Tribe and the Florida Department of Transportation, providing further detail to the original settlement reached 15 years earlier. If the Narragansett

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[14] The Secretary's authority, and any limitations to that authority, to take land into trust under settlement acts is provided in the settlement act itself and does not rely on the IRA. In fact, only one of the settlement acts surveyed recognizes the Secretary's authority to take land into trust under § 475 of the IRA. 25 U.S.C. § 1773c. That settlement act, between Washington and the Puyallup, involves a tribe that had lost reservation land through allotment. 25 U.S.C. §1773(a)(3). As discussed in Section I, *supra*, the Puyallup are one of the tribes that suffered harm Congress intended the IRA to remediate.

Tribe seeks jurisdiction over non-settlement land, it, too, might consider a legislated solution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DAN M. KAHAN
TERRI-LEI O'MALLEY
YALE LAW SCHOOL
SUPREME COURT CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-4800

RICHARD RUDA*
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street,
N.W.
Suite 309
Washington, DC 20001
(202) 434-4850

* Counsel of Record for
the *Amici Curiae*

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AMICUS CURIAE BRIEF

101

16

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DONALD CARCIERI, ET AL.,
Petitioners,
v.
DIRK KEMPTHORNE, ET AL.,
Respondents

On Writ of Certiorari
to the United States Court of Appeals
For the First Circuit

BRIEF OF HISTORIANS FREDERICK E. HOXIE, PAUL C. ROSIER, AND CHRISTIAN W. MCMILLEN AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Sean H. Donahue
DONAHUE & GOLDBERG, LLP
2000 L St, NW, Suite 808
Washington, D.C. 20036
(202) 466-2234

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 9

I. THE ENACTING CONGRESS DID NOT INTEND TO EXCLUDE LATER-RECOGNIZED TRIBES FROM THE IRA OR PROHIBIT THE SECRETARY FROM USING HIS DISCRETIONARY SECTION 5 AUTHORITY ON BEHALF OF SUCH TRIBES 9

II. CONGRESS DID NOT LIMIT THE IRA TO ALLOTTED TRIBES 21

III. PETITIONERS' UNDERSTANDING OF THE IRA'S DEFINITION SECTION IS NOT HISTORICALLY - OR TEXTUALLY-SUPPORTED 26

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Carcieri v. Norton,
290 F. Supp. 2d 167 (D. R.I. 2003) 32

Hodel v. Irving, 481 U.S. 704 (1987) 22

Narragansett Indian Tribe v. National
Indian Gaming Comm'n,
158 F.3d 1335 (D.C. Cir. 1998) 25

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) 25

Morton v. Mancari, 417 U.S. 535 (1974) 10, 25

Mountain States Tel. & Tel. Co. v. Pueblo
of Santa Ana, 472 U.S. 237 (1985) 22

South Carolina v. Catawba Indian Tribe,
476 U.S. 498 (1986) 2, 14, 15, 16, 28

United States v. Celestine, 215 U.S. 278 (1909) 24

STATUTES & LEGISLATIVE MATERIALS

25 U.S.C. § 71 10

25 U.S.C. § 461 10

25 U.S.C. § 465 ..... *passim*

25 U.S.C. § 466 ..... 11, 28

25 U.S.C. § 467 18

25 U.S.C. § 468 28

25 U.S.C. § 469 24

25 U.S.C. § 470 ..... 11, 24

25 U.S.C. § 471 ..... 11, 28

25 U.S.C. § 472 ..... 11, 28

25 U.S.C. § 473 21

25 U.S.C. § 475 26

25 U.S.C. § 476 ..... 11, 25, 28

25 U.S.C. § 478 ..... 29, 30

25 U.S.C. § 479 ..... *passim*

Alaska Reorganization Act of 1936,
49 Stat. 1250 20

Catawba Indian Tribe Division of Assets Act
of 1959, Pub. L. No. 86-322 15

Catawba Indian Tribe of South Carolina Land
Claims Settlement Act of 1993,
Pub. L. No. 103-116 15

Rhode Island Indian Claims Settlement Act,
25 U.S.C. § 1701 *et seq.* 4

Hearing on S. 2744 and S. 3645 Before
the S. Comm. on Indian Affairs,
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Carolina: History and Condition of the
Catawba Indians of South Carolina,
Sen. Doc. 92, 71st Cong., 2d Sess. (1930) 15

REGULATIONS & ADMINISTRATIVE MATERIALS

25 C.F.R. § 83.7 3

25 C.F.R. § 151.2(b) 3

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of Narragansett Indian Tribe of Rhode Island,
48 Fed. Reg. 6177 (Feb. 10, 1983) 3, 32

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Indian Issues: Improvements Needed in Tribal
Recognition Process (Nov. 2001) 31

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2 Solicitor's Opinions 1255 (Mar. 20, 1944) 15

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LEONARD A. CARLSON, INDIAN BUREAUCRATS AND LAND (1981) 23

STEPHEN J. CRUM, THE ROAD ON WHICH WE CAME: A HISTORY OF THE WESTERN SHOSHONE (1994) 19

CHARLES E. CLELAND, THE PLACE OF THE PIKE (GNOOZHEKAANING): A HISTORY OF THE BAY MILLS INDIANS COMMUNITY (2004) 17, 18

THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 387 (VINE DELORIA, JR., ed. 2002) 13, 23

ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND (1998) 18

FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984). 24

PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 151 (2002). 23

LAWRENCE C. KELLY, THE ASSAULT ON ASSIMILATION: JOHN COLLIER AND THE ORIGINS OF INDIAN POLICY REFORM (1983). 22

Padraic McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151, AMERICAN IND. L. REV. 422 (2002-2003) 25

LEWIS MERIAM, INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928) 24

JAMES MERRILL, THE INDIANS NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL (1989) 15

KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977) 10

FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984) 29

Lynn Arnold Robbins, Upper Skagit (Washington) and Gambell (Alaska) Indian Reorganization Act Governments: Struggles with Constraints, Restraints, and Power, 10:2 AM. IND. CULTURE & RES. J. 61 (1986) 18

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GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945 (1980) 5

INTEREST OF *AMICI CURIAE*[*]

Amici are historians who have studied and written extensively about federal Indian law and policy, up to and including the twentieth century. This work has examined the Indian Reorganization Act of 1934, including the socioeconomic, cultural and political circumstances of its enactment and implementation, the statute's meaning and effect for particular tribes, and its place in the unfolding narrative of the Native American experience in the United States.

Frederick E. Hoxie is Swanlund Endowed Chair in History at the University of Illinois and Professor of Law at the University of Illinois College of Law. He is the author or editor of many books and articles on American Indian history, including A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984); THE NATIVE AMERICANS: AN ANNOTATED BIBLIOGRAPHY (1991) (co-editor with Harvey Markowitz); THE ENCYCLOPEDIA OF NORTH AMERICAN INDIANS (1996) (editor); TALKING BACK TO CIVILIZATION: INDIAN VOICES FROM THE PROGRESSIVE ERA, 1890-1925 (2001); and THE PEOPLE: A HISTORY OF NATIVE AMERICA (2007) (co-author with Neal Salisbury and R. David Edmunds).

Paul C. Rosier is Associate Professor of History at Villanova University. He is the author of numerous articles on American Indian history and policy, including

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[*]The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* state that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity, other than *amici* or counsel, made a monetary contribution to the preparation or submission of the brief.

several addressing the implementation of the Indian Reorganization Act. His scholarly works include *The Old System Is No Success: The Blackfeet Nation's Decision to Adopt the Indian Reorganization Act of 1934*, 23 AM. IND. CULTURE & RES. J. 1 (May 1999); NATIVE AMERICAN ISSUES (2003); REBIRTH OF THE BLACKFEET NATION, 1912-1954 (2001); and SERVING THEIR COUNTRY: AMERICAN INDIAN PATRIOTISMS IN 20TH CENTURY AMERICA (forthcoming).

Christian W. McMillen is Assistant Professor of History at the University of Virginia. Prior to joining the University of Virginia faculty in 2004, he was Samuel I. Goleib Fellow in Legal History at New York University Law School. In addition to numerous published articles, he is the author of MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY (2007).

As Justices of this Court have emphasized, "Even more than other domains of law, 'the intricacies and peculiarities of Indian law deman[d] an appreciation of history.'" *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 511 (1986) (Blackmun, J., dissenting) (quoting Frankfurter, *Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954)). In this brief, we gather historical evidence that may help the Court assess petitioners' central claim: that in enacting the Indian Reorganization Act (IRA) in 1934, the 73rd Congress intended to prevent the Secretary from exercising powers under the Act for the benefit of a tribe such as the Narragansett.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns Section 5 of the IRA, the provision that authorizes the Secretary of the Interior "at his

discretion" to pursue various kinds of transactions "for the purpose of providing land for Indians" and then take title "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired* * *," 25 U.S.C. § 465.

In asking the Court to invalidate the trust land transaction here, petitioners do not dispute that the Narragansett qualify as a "tribe" under the definition section of the IRA, see *id.*§ 479 ("The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or [group of] Indians residing on one reservation") or the applicable departmental regulations, see 25 C.F.R. § 151.2(b). Nor do they dispute that the Narragansett enjoy a government-to-government relationship with the United States. More than a quarter century ago, the Secretary formally acknowledged the tribe, see 48 Fed. Reg. 6177 (1983) – an action that necessarily encompassed determinations that it comprises a distinct community and has existed, and maintained political influence or authority over its members, from historical times until the present. See 25 C.F.R. § 83.7.

Rather, petitioners maintain that Congress, in enacting the IRA, prohibited the Secretary from exercising the land acquisition authority for tribes whose formal federal recognition post-dated the statute's June 1934 enactment. This intent, petitioners argue, was expressed in language in the Act's definition section providing that

> [t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, who are descendants of such members who were, on June 1, 1934, residing within the present

> boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479. A restrictive reading of the Section 5 power, petitioners posit, "makes eminent sense," Governor's Br. 15, because the Act was adopted for the purpose of reversing the disastrous policy of allotting tribal lands – and because that policy had never been applied to the Narragansett (or other later-acknowledged tribes). Petitioners argue, alternatively, that Congress extinguished the Secretary's power to take lands into trust for the Narragansett by passing the Rhode Island Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*

In this brief we do not address that alternative argument. Nor do we consider whether other later-enacted legislation affirmatively grants or confirms the Secretary's authority to take land into trust here, see Respondents' Br. 36-40, or the consequences that would ensue from adopting petitioners' reading. Rather, we confine our consideration to contentions that those responsible for the Act's passage in 1934 meant to disable the Secretary from applying it to later-acknowledged tribes; that the disputed Section 19 language was adopted for that purpose; and that this restriction was congruent with the statute's allotment-reversal aim.

In so doing, we do not minimize the difficulty of ascertaining the "intention" of any legislation, let alone determining how those who enacted it expected it to apply in circumstances they could not have foreseen; and we readily acknowledge that the IRA is hardly exempt from these difficulties. The Act, though understood at the time – and judged by history – to be one of the most important pieces of federal Indian legislation, was drafted and passed with limited debate and discussion; its

enactment history had numerous unusual aspects; like other, contemporaneous New Deal statutes, it conferred significant discretion on its Executive Branch administrators; and like many statutes in the field of Indian law, both the nature of the problems addressed and the law's intended operation were incompletely understood by many (likely most) of those who voted it into law.[1] Moreover, the individuals particularly responsible for the Act's passage – including Commissioner of Indian Affairs John Collier and Burton K. Wheeler, the Chair of the Senate Indian Affairs Committee – had divergent views about the ultimate aims of federal Indian policy (although there were important points of agreement, too) and were inclined to understand the Act's meaning through these different lenses.

That said, we find that the historical record contradicts the thesis that the 73rd Congress intended to deny benefits of the IRA generally, or Section 5 trust lands, in particular, to tribes that would later come under federal jurisdiction.

I. There is no historical evidence that those responsible for enacting the IRA intended it to effect a moratorium on the Interior Department's power to establish relations with tribes, nor is it plausible that they intended to deny the Act's benefits to later-recognized tribes.

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[1]The enactment history is detailed in ELMER RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000); see also GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945 (1980).

Petitioners' argument ignores an important feature of the Act: its fundamentally dynamic character. A central objective of the IRA, expressed in several of its most important provisions, was to provide a *mechanism* whereby Indians, including tribes with little recent contact with the federal government (and Indians who were not members of recognized tribes) could "organize." And it was widely understood that once organized, these tribes would be entitled to the full range of benefits the Act provides, including tribal trust land. In fact, those who drafted and enacted the law specifically intended the Secretary to acquire land for the benefit of then "landless" Indians, including bands and tribes that were not then under federal jurisdiction.

The implementation of the IRA confirms this understanding. In the years immediately after the law's enactment, the Office of Indian Affairs (OIA), under the leadership of Collier, the draftsman of the language petitioners rely on, repeatedly allowed tribes that would not have been viewed as "under federal jurisdiction" in 1934 to organize and reap IRA benefits, including trust land acquired under Section 5. Indeed, while the OIA's various decisions of this period are not always clear, they and the contemporaneous administrative regulations are inconsistent with the notion that a tribe's jurisdictional status as of June 1934 was controlling.

Equally telling were Congress's actions during this same period. Far from reasserting the restrictive purposes petitioners ascribe, Congress enacted legislation in 1936 applying the dynamic mechanism of the IRA to Alaska, with the avowed and undeniable intent of bringing previously unrecognized (and never-allotted, see *infra*) tribes within the Act's reach.

II. The only explanation petitioners advance for their reading is that it comports with a claimed congressional intent to limit the statute to those who had been harmed by the federal government's allotment policy.

But Congress had no such intent. Although growing awareness of the devastating effects of allotment was a catalyst to the legislative activity that culminated in the IRA's enactment, the suggestion that Congress meant for the IRA – or Section 5 – to benefit *only* those tribes that had been subject to the allotment policy is simply untenable.

The text and legislative history of the Act support no such limitation, and those responsible for its enactment clearly meant it to apply to non-allotted and allotted tribes alike. Consistent with that intent, all the Act's provisions (including Section 5) were promptly – and non-controversially – applied to tribes that had never been allotted.

Indeed, such a restriction "makes sense" only by ignoring the history that led Congress to enact the IRA and the broader policies it pursues. Rather than merely providing remedies for discrete historical injuries, Section 5, like other key provisions of the Act, was forward-looking, expressing a renewed governmental commitment to enabling tribes, whether or not allotted, to pursue economic development and at least a modicum of self-government.

III. Petitioners' far-reaching claims for the "plain language" of the Act's "Indian" definition are likewise rooted in misunderstanding.

As noted, what petitioners identify as the unambiguous import of the statutory language was not "plain" to Collier or congressional leaders at the time of

the IRA's enactment, and the claimed limitation was inconsistent with what they intended the Act to accomplish.

Indeed, the actual, disputed language does not suggest a tribal exclusion from the Act. It identifies classes of "*persons*" that "shall [be] *include[d]*" within the term "Indian," as part of a provision that includes a separate, broad definition of "tribe," and a statute that provides individual, as well as tribal benefits – and that uses both terms frequently and imprecisely enough that even petitioners cannot claim that each occurrence may be treated as a deliberate choice.

The distinction suggested in the text of Section 19 (and expressly echoed in Section 5's dual reference to "Indian tribes" and "individual Indians") is consistent with historic reality: those who drafted and debated the IRA viewed tribal and individual application as raising very distinct questions, warranting very different answers. While the key figures repeatedly discussed (and generally agreed on) the need to exclude highly assimilated *individuals* of Indian descent from the Act's coverage, discussions about the Act's application to *tribes* had a very different tenor, principally centering on whether such application would be compulsory (and whether special, parochial exclusions, urged by non-Indian interests, should be part of the Act).

Indeed, to the extent the discussion that prompted the adoption of the disputed "now * * * " language could be understood as addressing tribal application, the concern expressed was essentially the opposite of the one petitioners contend the language addresses, namely, that a tribe's status as of 1934 should *not* be conclusive under the Act. And it would, in any event, still require a large and doubtful leap to infer that Congress

specifically targeted tribes like the Narragansett for exclusion. As the Interior Department has authoritatively determined, they *were* recognized as a tribe in 1934, and its prior reluctance to provide federal services had been based on the (legally untenable) premise that, as "State Indians" they were outside the federal government's "guardianship" responsibility.

ARGUMENT

I. THE ENACTING CONGRESS DID NOT INTEND TO EXCLUDE LATER-RECOGNIZED TRIBES FROM THE IRA OR PROHIBIT THE SECRETARY FROM USING HIS DISCRETIONARY SECTION 5 AUTHORITY ON BEHALF OF SUCH TRIBES

Although petitioners are emphatic that the IRA must be read as having prohibited Section 5's application to tribes like the Narragansett, see Governor's Br. 17-23; Rhode Island Br. 21-29; Charlestown Br. 22-25, it is difficult to pin down with precision exactly what intention they ascribe, *i.e.*, whether they contend Congress intended: (1) that no tribes would come under federal jurisdiction after the IRA's enactment; (2) that tribes would be recognized under federal jurisdiction after June 1934, but would be excluded altogether from the IRA's provisions; or (3) that such tribes would be subject to some of the IRA's provisions, but excluded from others, including the trust land provision of Section 5. Each proposition raises distinct, insuperable historical objections.

As for the first, it is altogether implausible that those responsible for the IRA intended it to constrict, let alone bring an end to, the federal government's longstanding practice of establishing and re-establishing relations

with particular tribes. The statutory language on which petitioners rely, providing that "'Indian'* * * shall include all persons * * * *" would an be extraordinarily indirect way to say "no tribes shall hereafter come under federal jurisdiction" – especially in a provision that included a separate, broad definition of "tribe," compare 25 U.S.C. § 461 (upon enactment "no land of any Indian reservation * * * shall be allotted in severalty to any Indian"); cf. *id.* § 71 (after 1871, "[n]o Indian nation or tribe within the territory of the United States shall be [treated with]"), and any such claim would ignore the basic premises reflected in the IRA.

Although not all those responsible for the IRA shared the view of Commissioner Collier, who had been a prominent and outspoken champion of Indian rights before taking office, that tribal survival and self-government should be the ultimate aim of federal Indian policy, the IRA reflected widespread agreement that prior policies, which aimed at dissolving tribal relations, had been disastrous, and a central object of the Act was to establish a *mechanism* whereby tribes – including ones that were not yet federally recognized – could organize and thereby come under federal jurisdiction. Cf. *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974) ("[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").[2] Consistently with this intention, Section 16 of the IRA, which authorizes "any Indian tribe" to "organize for its common welfare," and to adopt a constitution, nowhere turns on whether the

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[2]See generally KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977).

tribe was previously under federal jurisdiction, 25 U.S.C. § 476.

Nor can it credibly be suggested that Congress intended to consign newly recognized tribes to a jurisdictional limbo, wherein they could never benefit under the Act's other provisions. Such a theory would not only deny secretarially-acquired trust lands, but would make these tribes ineligible for forestry management plans and loans; deny their members employment preferences and educational benefits – and quite implausibly, leave later-recognized tribes subject to allotment. See 25 U.S.C. §§ 466, 470-72. We know of no one who advocated such a regime; the obvious premise of each of these provisions was that such benefits were vital to improving conditions for Indians, irrespective of how or when they came to be acknowledged by the federal government.

To read the claimed temporal limitation into Section 5 alone is perhaps the least plausible of all. The IRA's principal authors expected and specifically intended land to be acquired for tribes that were not then under federal jurisdiction. At the May 17 Senate Hearing, Commissioner Collier made clear his understanding that "wandering bands of Indians who have no reservation at all" would be "colonized" on "new reservations" acquired under the Section 5 authority, *Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 241 (1934) (Senate Hearing), and Senator Wheeler expressly agreed that such Indians – almost none of whom were under federal jurisdiction at the time – would be settled on newly acquired lands, *id.*

Likewise, in a detailed, section-by-section analysis of the Senate and House versions of the Act, the Office of Indian Affairs endorsed the ultimately-enacted Senate

version of Section 7, because it made clear that "'lands acquired under this Act' would, without doubt be deemed reservation lands." It opposed the House's bill's alternative, on the ground that it risked being read to

> restrict, *rather than extend the present federal jurisdiction* [and] deny federal jurisdiction over Indians now landless and competent who take up residence on newly acquired federal lands.

U.S. Dep't of Interior, *Analysis of Differences Between House Bill and Senate Bill* at 6 (June 1934) ("OIA Analysis"), archived in the John Collier Papers (Microfilm), Sterling Mem. Library, Yale Univ., New Haven, Conn (emphasis added).

Finally, obtaining land for such Indians was of great import not only to Commissioner Collier and Senator Wheeler, but also to tribes themselves, whose support played an important role in securing the Act's passage. Because Indians had not been made aware of the bill's provisions, it received a decidedly mixed initial reaction in Indian country, with numerous tribes notifying Congress that they did not support the new measure. See RUSCO at 210-215. This unexpected reaction prompted an unprecedented response from the OIA: it convened ten congresses across Indian country in the winter and spring of 1934, attended by Collier and his staff, along with Felix Cohen and other attorneys from the Solicitor's Office of the Interior Department, with the aim of explaining the proposed measure, soliciting input and ultimately securing Indian support. See *id.* at 245-48. A concern raised repeatedly at these congresses was that the Act (and the land acquisition provision in particular) not exclude groups of landless Indians who were not then under federal jurisdiction. Collier and his colleagues regularly answered that the IRA would

provide a means for their future inclusion.[3]

Notably, petitioners point to no indication that Congress intended trust land to be restricted to a certain subset of recognized tribes. Nor (apart from its reference to "Indians," see pp. 26-32, *infra*) do they identify anything particular to the text of Section 5 that suggests such a restriction. On the contrary, that provision, which authorizes the Secretary "in his discretion[] to acquire * * * any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians" speaks in broad and comprehensive enough terms that petitioners challenged it, unsuccessfully, on "non-delegation" grounds, in the courts below. Pet. App. 57-59.

Indeed, the OIA was emphatic that the Section 5 language was not restrictive – and that it contemplated lands being acquired to settle "groups of landless Indians." In its section-by-section analysis, it explained:

> The purpose of [Section 5] is to protect Indian use of lands through tribal or corporate ownership. The use of the word "tribe" in this section is not intended to exclude ownership by groups of landless Indians settled on subsistence homesteads. Areas set aside for such homesteads are technically Indian reservations. The residents of such areas may be considered a "tribe" for purposes of tribal incorporation, etc., under the definition included in [Section 19]

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[3]See, *e.g.*, THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 387 (VINE DELORIA, JR., ed. 2002) (describing Hawyard, Wisconsin congress).

OIA Analysis at 5.[4]

Although it is of course not possible to ascertain the subjective intent of individual protagonists, the actions taken by both the Executive Branch and Congress in the immediate wake of its adoption make clear that they did not understand the Act to have imposed the rigid restriction posited. From the inception, the Act was applied to – and trust land was acquired for – tribes that indisputably had not been "under federal jurisdiction" in June 1934, and regulations were promulgated that used "now" to mean the time of application, see Br. of Respondents 31 (citing examples). All this was done under the authority of Commissioner Collier, the individual responsible for the language on which petitioners rely.

Among the tribes that eventually organized under the IRA were groups that, in 1934, had not had formal relationship with the United States for many years, ones that had no resident agent (Saginaw Chippewa), groups whose reservation was virtually abandoned (Pojoaque), tribes that had no trust land (Bay Mills), and tribes that fit into all these categories (Western Shoshone).

Especially telling is the example of the Catawba Indian Tribe of South Carolina, which the Department allowed to organize under the IRA in 1944, see *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 502 (1986), but which was distinctly not "under federal jurisdiction" at the time the IRA became law, see *id.* at

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[4]Notably, as drafted by the OIA, and passed by House, Section 5 did not authorize acquisition of trust lands for "individual Indians." See OIA Analysis at 5. The focus, consistent with the statutory goal of giving Indian tribes the tools for effective self-government, was on providing land to tribes.

515 (Blackmun, J., dissenting).[5] By the 1930s, the Catawba, though maintaining their Indian identity and, by many measures, a recognizable tribe of Indians, had not had a relationship with the federal government for nearly a century. When they entered into the Treaty of Nation Ford with the government of South Carolina in 1839 (the legality of which was later challenged, see Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116), the federal government considered them under the jurisdiction of the state and not "wards" of the federal government. Just as he had refused to pursue the Narragansett's entreaties, see Charlestown Br. 7-9, the Commissioner of Indian Affairs had advised the Catawbas in 1906 and again in 1909 that the Interior Department would not seek relief on their behalf, on the ground that they were "'state Indians" for whom the United States had no responsibility." *Catawba Indian Tribe*, 476 U.S. at 515-16 & n. 4 (Blackmun, J., dissenting).[6]

In the May 17 Senate Hearing, Senators O'Mahoney and Thomas had specifically invoked the Catawba, with the former observing that they fell within the IRA's

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[5]See "Catawba Tribe-Recognition Under the IRA," 2 Solicitor's Opinions 1255 (Mar. 20, 1944).

[6]See H. Lewis Scaife, *Catawba Indians of South Carolina: History and Condition of the Catawba Indians of South Carolina*, Sen. Doc. 92, 71st Cong., 2d Sess. (1930); JAMES MERRILL, THE INDIANS' NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 226-275 (1989) (chronicling post-Treaty of Nation Ford history).

The Catawba were terminated pursuant to the Catawba Indian Tribe Division of Assets Act, Pub. L. No. 86-322 (1959), but a government-to-government relationship was reestablished by the 1993 legislation.

definition of "tribe" and stating he did not "know of any reason" for excluding them from the benefits of the Act, Senate Hearing at 266, asking "Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation?" *Id.* Nor was it surprising that the Catawba would have come up in the forum. As this Court noted, a subcommittee of the same committee that considered the IRA had traveled to Rock Hill, South Carolina in 1930 and held hearings on the plight of the Catawba, with Senator Thomas reporting that the "subcommittee * * * found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." See 476 U.S. at 502 n.7 (citing legislative history).[7]

D'Arcy McNickle, of OIA's Enrollment Committee, noted that the Catawbas appeared to:

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[7]Notably, Senator Thomas expressed his disapproval of the OIA's failure to take the Catawba under jurisdiction, observing that "the Government has not found out the live, apparently," Senate Hearing at 266, and both Senators' statements make clear that they read the Act's language as including the Catawba. See *id.*

If Senator O'Mahoney had been similarly familiar with the circumstances of the Narragansett, he could have made much the same point about them. They were, by many measures, a group of people recognized as Indians. Narragansett children attended federally run Indian boarding schools into the twentieth century; like many other tribes, the Narragansett had attempted to prosecute a claim asserting that their land had been taken unlawfully, a claim on which Congress held hearings in 1900; Narragansetts were counted on Indian Office censuses and on the federal census as late as 1930; and the State of Rhode Island granted them a state charter in 1934. See, *e.g.* Ethel Boissevain, *Narraganset Survival: A Study of Group Persistence Through Adapted Traits*, 6:4 ETHNOHISTORY 347-62 (1959).

> occupy a position identical with that of the Alabama and Coushatta Indians in Texas, who for years were refused government aid because they were not Federal Indians. Eventually, however, we were prevailed upon to cooperate with the State in helping those Indians, and last June they were permitted to vote on acceptance of the IRA.[8]

The Michigan Bay Mills Ojibwe Indian Community provides another example of the contemporaneous understanding of the Act. They had once been under federal jurisdiction, but by the early twentieth century the federal government had declared that Bay Mills land was "not technically a reservation" and that the Bay Mills Indians were no longer "wards of the government." The Indians living at Bay Mills were citizens, with no treaty rights and no recognized Indian government.[9] Nonetheless, reorganization efforts began in June 1935, one year after passage of the IRA. Commissioner Collier suggested, and the Bay Mills community agreed, that they should organize as "Indians residing on one reservation" – though that very land had been held not to be an Indian reservation by previous administrations. A question remained, however: What would become of the many Michigan Ojibwe people affiliated with the Bay

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[8]McNickle, "Memorandum to the Commissioner; Subject: Catawba Indians," published in H.R. Serial No. 103-34 (Hearing on H.R. 2399 House Subcomm. on Native American Affairs (July 2, 1993)) at 822. In the 1934 Senate Hearing (at 265), Senator Thomas had said of the Catawba, "they are not half bloods," later clarifying (at 266) "some presumably are half-bloods, but many are not."

[9]See CHARLES E. CLELAND, THE PLACE OF THE PIKE (GNOOZHEKAANING): A HISTORY OF THE BAY MILLS INDIANS COMMUNITY 34 (2004).

Mills community who lived elsewhere, having been scattered by various historical forces? The answer: organize the community living on or near the "reservation" and, once organized, amend the tribal constitution to admit these others to the tribe.[10] Thus, the Bay Mills community became a recognized Indian tribe under federal jurisdiction *after* the passage of the IRA in a fashion *only* possible after the passage of the Act. Likewise, the BIA actively encouraged Indians such as the Klallam and Nooksack, who were neither recognized nor under federal jurisdiction, to organize IRA governments.[11]

Further evidence of the contemporaneous understanding comes from the Western Shoshone of Nevada – a group with no land base (and thus no history of allotment, see *infra*). The Shoshone had not been under federal jurisdiction and were not a recognized tribe; they were a loose grouping of linguistically and culturally-related Indian peoples organized historically into bands. Using the IRA, the BIA created four new reservations in Nevada, see 25 U.S.C. § 467, and thereby formally recognized and took under federal jurisdiction four new Shoshone tribes.[12]

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[10] *Ibid.* at 70.

[11] See ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 200-202. (1998); see also Lynn Arnold Robbins, *Upper Skagit (Washington) and Gambell (Alaska) Indian Reorganization Act Governments: Struggles with Constraints, Restraints, and Power*, 10:2 AM. IND. CULTURE & RES. J. 61-73 (1986).

[12] For this history, see Elmer Rusco, *The Indian Reorganization Act in Nevada: Creation of the Yomba Reservation*, 13:1 J. CALIFORNIA & GREAT BASIN ANTHROPOLOGY 77-94 (1991); Rusco,

The Western Shoshone experience illustrates the broad ambition of the IRA and the implausibility of the static, backward-looking construction petitioners urge. What *gave* these Indians "recognition" and placed them "under federal jurisdiction" was their becoming IRA-organized tribes.[13]

In those early, nearly contemporaneous decisions (and numerous others up to the present), the Interior Department did not treat a tribe's "jurisdictional status" as of June 1934 as decisive of its eligibility under the IRA. And the same can be said of the agency's administrative regulations adopted shortly after the Act's passage. See Respondents' Br. 30-31. Indeed, even in instances when the OIA declined an IRA application, the agency based its decisions on whether the Indians were a "tribe" at the time of application, not whether they were one in June 1934, *id.* at 32.

We do not read the 1936 Circular cited in respondents' brief (at 34-35), as to the contrary. That departmental guidance document does not purport to address the Act's definition of "tribe" or the application of Section 5 – or any other provisions of the statute that

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The Organization of the Te-Moak Bands of Western Shoshone, 25 NEV. HIST. SOC'Y Q. 175-196 (Fall 1982); Rusco, *Formation of the Reno-Sparks Tribal Council, 1934-1939*, 30 NEV. HIST. SOC'Y Q. 316-339 (Winter 1987); and STEPHEN J. CRUM, THE ROAD ON WHICH WE CAME: A HISTORY OF THE WESTERN SHOSHONE 91-99 (1994).

[13]Nor were these examples unique. *Amicus* NCAI identifies the Grand Traverse Band of Ottawa and Chippewa Indians, the Sault Ste. Marie Tribe of Chippewa Indians, the Cowlitz Indian Tribe, and the Poarch Band of Creek Indians (Alabama), as other instances of tribes accorded IRA benefits that would have been said to have been recognized or under federal jurisdiction in 1934.

reference tribes. Its subject was individual enrollment, and even with respect to individuals, the focus was the Office's administration of its responsibilities to those who were "Indians" under the Act by reasons other than tribal membership, *i.e.*, by descent and (especially) "blood quantum." Although the Circular, unlike other OIA documents from the period, describes the first category with reference to "the date of the Act," it does not purport to define an exclusive or permanent class of eligible persons: As does the statute, it states that the "term 'Indian'" "shall include" various classes of persons. See *id.* ("if a person belongs * * * he is entitled to participate in the benefits of the Act* * * *").

As explained above, the Department's practice; the views of Collier and other principal supporters; and the fundamental purposes of the Act, all support the view that the Act was not, in fact, intended (and was not interpreted) to foreclose from IRA benefits *tribes* that came under federal jurisdiction after June 1934.

As respondents note (Br. 36), Congress has never disturbed or expressed disapproval of this understanding, and statutes enacted in ensuing decades both presuppose its correctness and likely *prohibit* the Department from adopting the interpretation petitioners urge. But at least as significant, only two years after enacting the IRA, Congress enacted the Alaska Reorganization Act of 1936, 49 Stat. 1250, which expressly provided that "Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title." *Id.*, §

1, codified at 25 U.S.C. § 473a.

Of course, the Alaska statute does not control the interpretation of the provisions of the IRA. But it is surely hard to reconcile claims that Congress intended the 1934 statute to rigidly exclude tribes, no matter how deserving or in need, that were not already under jurisdiction, with the 74th Congress's enactment, two years later (just as the IRA was being implemented) of provisions taking an aggressively forward-looking approach.

This sequence of events, we believe, combined with the repeated expressions of intent to use the IRA to bring under federal jurisdiction and acquire trust land for previously unrecognized groups, strongly refute petitioners' claim of specific, restrictive intent.

II. CONGRESS DID NOT LIMIT THE IRA TO ALLOTTED TRIBES

Petitioners repeatedly assert that Congress meant for the IRA – or Section 5 – to benefit *only* those tribes which had been subject to the allotment policy. Indeed, all the petitioners are insistent upon reading into the IRA this entirely implicit limitation. See, *e.g.*, Rhode Island Br. 16 ("The purpose of the IRA was to terminate the allotment policy and to undo some of the damage it caused."); Governor's Br. 4 (stating that Section 5 was enacted "to provide land for those tribes and individual Indians that had been rendered landless by the allotment policy"); Charlestown Br. 6-7 ("The purpose of the IRA * * * was to return a land base to those tribes that lost or could have lost land through allotment; namely, those tribes that were previously federally recognized and under federal jurisdiction at the time of the Act."). These assertions are simply not historically tenable.

To be sure, growing awareness of the disastrous effects of the allotment policy was an important catalyst to the IRA's enactment, see RUSCO at 291; *Hodel* v. *Irving*, 481 U.S. 704, 707-08 (1987) (citing the conclusion of the influential 1928 "Meriam Report"). But we know of no evidence that *anyone* in Congress or the OIA favored (or even considered) limiting the Act's application to tribes that had been allotted, and the statutory text does not hint at such a restriction. On the contrary, the purportedly dispositive definition section itself provides that Alaska Eskimos – who did not have reservations and were never allotted – would be considered "Indians" for purposes of the Act and also extends "tribe[s]" to include "pueblo[s]," 25 U.S.C. 479, which were not subject to allotment. See, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 253 n.28 (1985).[14]

Not only is the congressional discussion of acquiring trust land for "wandering bands," which had not previously had reservations, irreconcilable with an intent to help allotted tribes only (or even especially), but the historical record discloses that some in Congress had the exactly opposite intent of the one petitioners hypothesize. See RUSCO at 260 (noting that "during the legislative consideration of the bill, both the authority to adopt constitutions and two provisions dealing with incorporation *applied only to reservations that had not*

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[14]The New Mexico pueblos were of special concern to Collier, whose original interest and involvement in Indian policy had been sparked by his introduction to them, and who had championed their interests before Congress and the OIA for more than a decade before becoming Commissioner. See generally LAWRENCE C. KELLY, THE ASSAULT ON ASSIMILATION: JOHN COLLIER AND THE ORIGINS OF INDIAN POLICY REFORM (1983).

been allotted," but that these limitations were later dropped) (emphasis added).

Unsurprisingly, the Act's provisions, including Section 5, were applied immediately and non-controversially to tribes whose lands were never allotted. The 258 tribes that voted on the IRA between 1934 and 1936 included a number whose reservations had not been subject to federal allotment, and Commissioner Collier made a personal, concerted effort to urge the Navajo and other southwestern tribes that had never been allotted to take advantage of Act. See DELORIA, *supra*, at 404; PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 144-151 (2002). And as noted above, land was acquired under the IRA for tribes like the Western Shoshone, that had never been allotted. (Indeed in Nevada, New Mexico, and, Arizona, home to a number of tribes that organized under the IRA, only about 2% of tribal land – 542,066 out of a total of 25,199,250 acres – had been allotted by the end of the 1920s. See LEONARD A. CARLSON, INDIAN BUREAUCRATS AND LAND 147 (1981)).

An allotment-only limitation would have been entirely alien to those who enacted the IRA, and the thesis "makes sense" only to the extent one disregards the actual history, purposes, and design of the statute.

As the statutory text itself makes plain, allotment (and its consequences) were not all "the IRA was intended to remedy," Governor's Br. 15. The Act was enacted to respond to a constellation of problems facing Native Americans, which had numerous causes, of which federal land allotment policies were but one part. Thus, while the "Meriam Report" is widely credited with having raised awareness in Congress about the failures of allotment, only a small fraction of that report's 872

pages dealt with the subject. See L. MERIAM, INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). Both the broad array of social problems it documented and its reform proposals applied to non-allotted tribes and allotted ones alike.

Moreover, allotment was itself part of a broader set of governmental policies aimed at speeding the "assimilation" of American Indians, with the effect – and often the avowed purpose – of weakening tribal attachments and institutions. See *United States* v. *Celestine*, 215 U.S. 278, 290 (1909) (noting that policy was intended to "put an end to tribal organization"). Thus, the selling off of tribal land in "checkerboard" fashion was of a piece with numerous other practices that aimed to eradicate native religions, indigenous languages, and communal ownership of property, and to shift power from tribal leaders to government agents. See generally FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

Unsurprisingly, the IRA includes numerous provisions that have nothing to do with land or resources, see, *e.g.*, §§ 469, 470; Respondents' Br. 22, and even petitioners presumably would acknowledge that those which address allotment most explicitly, sections 1 and 2, are forward-looking and intended to apply to tribal lands that had not, as of the 1934 enactment date, been allotted.

Even more important, to view Section 5 as a narrow remedy for a discrete, historically defined injured class misses something fundamental about the design and purposes of the IRA: its aim of re-orienting federal Indian policy generally in ways that respected and

encouraged tribes and tribal institutions. Although historians can and do argue about just how sharp and consequential a break with past practice the IRA represented (and those most responsible for the law's enactment would themselves have given different answers), the trust land acquisition provision was a critical element of the Act's policy of "'revitaliz[ing] tribal self-government." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-52 (1973); see *Mancari*, 417 U.S. at 542. As John Collier and the OIA keenly understood, economic considerations were only a part of the reason for the Section 5 power: tribal lands had great religious, cultural, and political significance, as well, and, unlike fee ownership, the trust form was communal and perpetual, sending a powerful internal and external signal that tribes would endure, rather than whither away. Cf. Padraic McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, AMERICAN IND. L. REV. 422 (2002).

Finally, although no such distinction was intended, or even contemplated by the IRA, it would *not* make "eminent sense," Governor's Br. at 15, to restrict the Act to tribes that were rendered landless by lawful, if ill-considered, application of allotment statutes, while excluding tribes whose tribal identity and land base were eroded by removal policies or, as in the case of Narragansett, by illegal State action. See *Narragansett Indian Tribe* v. *National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998) (describing State government's efforts to "extinguish [the Narragansett's] tribal identity"). See also 25 U.S.C. § 476(f) (amending the IRA to explicitly forbid the BIA – and all other "Departments or agencies of the United States" – from

"mak[ing] any decision or determination pursuant [to the statute]* * * that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes").[15]

III. PETITIONERS' UNDERSTANDING OF THE IRA'S DEFINITION SECTION IS NOT HISTORICALLY – OR TEXTUALLY – SUPPORTED

Apart from these efforts to hypothesize some reason why Congress *would have* excluded later-recognized tribes from trust lands, petitioners stake their claim almost entirely on the "plain meaning" of the IRA definition of "Indian," and, in particular, that the "now under federal jurisdiction" language added at the May 17, 1934 Senate Hearing should – or must – be understood as an exclusion of later-recognized tribes.

As explained above, neither the OIA nor Congress appeared to discern any such unambiguous instruction, and the restriction urged would have been inconsistent, in both specific and general ways, with what those who drafted the Act wanted it to accomplish. We believe the meaning petitioners ask the Court to impose on the particular language is very different from the one

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[15]The idea that only specific types of governmental wrongs warranted a response was rejected even in 1934. Senator Thomas objected strenuously to proposed statutory language explicitly *preserving* tribes' rights to pursue legal claims against the government for violating treaties, on the ground that it might be read as extinguishing the rights of Indians in his State, Oklahoma, who "had a lot of land taken from them" in *accordance* with treaties – ones consummated through "fraud, deceit, and collusion," Senate Hearing at 260-61. To accommodate this concern, the enacted version substituted more categorical language, see 25 U.S.C. § 475.

Congress intended.

Even taken on its own terms, petitioners' "plain language" contention is problematic. Section 19's actual wording identifies "members of recognized tribes now under federal jurisdiction" as among those "the term 'Indian' *shall include*" (emphasis added)—hardly an iron-clad prohibition on the Secretary's taking actions on behalf of others, especially given the use of more conventionally restrictive definitional language a few sentences later, see 25 U.S.C. § 479 ("the term 'tribe' wherever used in this Act * * * *shall be construed to refer to* any Indian tribe * * * ") (emphasis added).

Moreover, resort to grammatical principles such as the "rule of the last antecedent," Governor's Br. 33, does not seem a promising approach for understanding a provision which defines the term "Indian" by reference to "Indian tribe" and "Indian blood," and the term "tribe," with reference to "Indian tribe."[16] And treating Section 5's use of the plural word "Indians" as necessarily incorporating the limitation petitioners read in Section 19 leads quickly to results even they recognize Congress did not intend: for example, Section 1, which contains the same term, surely should prevent allotment of a later-recognized tribe's reservation.

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[16]Likewise, if the phrase "Indian tribe" in the "Indian" definition is given the same meaning as in the definition of "tribe," see Governor's Br. 21 (urging that identical statutory words be given the same construction) – *i.e.*, as distinct from an "organized band [or] pueblo" – see *id.* (arguing that each word be given independent meaning),then the Secretary could not, on petitioners' theory, exercise IRA powers on behalf of a *pueblo* that was under federal jurisdiction in June 1934.

Even more important, it is hardly plain – or even likely – that Congress meant the disputed language to affect the Act's application to tribes, rather than just to "persons." Most IRA provisions concern *either* individuals, such as the employment preference and the educational loan provisions, see 25 U.S.C. §§ 471, 472, *or* tribes, *id.* § 466, 476, and those who enacted the IRA viewed tribal and individual application as raising very distinct concerns.

In the individual context, Congress and the OIA, echoing long-running (and still-ongoing) debates about Indian identity, individualism, and the nature and extent of the government's responsibilities, wrestled repeatedly with whether highly assimilated individuals should be entitled to the benefits – and subject to the "burdens," chiefly the restraint on alienation of individually-owned land – that came with legal "Indian" status. See Senate Hearings at 264 (Sen. Wheeler) ("Why should the Government * * * be managing the property of a lot of Indians who are practically white and hold office and do everything else, but in order to evade taxes * * * come under government control?"). Some Indian landowners testified against the Act on individualist grounds, and they (and Senator Wheeler) were successful in removing a provision that would have allowed tribes to reacquire previously allotted lands from nonconsenting individual owners, see RUSCO at 249; see also 25 U.S.C. § 468.[17]

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[17]Cf. *Catawba*, 476 U.S. at 503-04 (noting that "members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations"). Senator Wheeler's preference for a "one-half" blood quantum definition, see Senate Hearing 264-65, harkened back to allotment era policies that allowed "competent" Indians to sell real property without OIA permission, and later included a conclusive presumption

For his part, Commissioner Collier had little interest in applying the Act to individuals who were not members of tribes or living among fellow Indians, and the OIA opposed including "individual Indians," rather than just tribes, as beneficiaries of Section 5 land-into-trust transactions. See OIA Analysis at 5 (Indeed, as noted, the Circular discussed at pp. 19-20, *supra* was issued in fulfillment of the Office's statutory responsibility for identifying individual, "blood quantum" Indians who were not members of tribes).

The congressional discussion of tribal application was very different. Although questions of tribal *power* were sharply debated, see Senate Hearing 248-49 (discussing tribal power to assess members); see RUSCO at 249; the most frequently discussed issue of tribal *application* concerned whether tribes not *wanting* the IRA regime would be *required* to be covered – and was addressed in *Section 18*, which recognized a (somewhat ambiguous) "opt out" right. Much time was also consumed discussing particular exclusions sought for the benefit of non-Indian interests, some of which (*i.e.*, ones championed by legislators whose support was needed for passage) were enacted into law.[18]

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of "competence" for individuals with less than one-half "Indian blood." See FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984) 872-84.

[18]There was also a good deal of discussion about what percentages of votes should be sufficient under Sections 16 and 18, see Senate Hearing at 252-53, and about whether a tribe's voting against the IRA's application would make a member ineligible for individual benefits under the Act. The Senate also modified the definition of "tribe" by deleting language that would have extended the term to every "native political group or organization," out of concern that it would supply competing factions on a single reservation with means

The text of Section 19 preserves this distinction. It includes a separate definition of "tribe," and the "now under federal jurisdiction" language addresses which "persons" are "Indians." See *supra*.[19] Indeed, neither of the alternatives with which the "membership" criterion is aligned *can* meaningfully be applied to a group: tribes cannot be "descendants" of individuals, and, as practically difficult – and constitutionally problematic – as it is to ascertain "blood quantum," for individuals, it is that much more so to describe a *group* as having a particular blood quantum.[20]

To be sure, the hearing at which the "now under federal jurisdiction" language was added included discussion of the IRA's tribal as well as individual application, but what was said and transpired does not

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to advance claims to tribal assets. See *id.* at 254.

As Professor Rusco observes, debate over the "irrelevant question" presented by Senator Ashurst's support for non-Indian mineral exploration on a single Arizona reservation consumed much more time than most of "the much larger and more important questions dealt with in the proposed bill," RUSCO at 230-31.

[19]Notably, the OIA Analysis describes the "Indian" definition as operative for "purposes of the Act, e.g. preferences in Indian Service Employment, land, loan, and educational benefits" (p. 14) – without mentioning provisions applicable to tribes, such as Sections 16 and 18. And, as noted above, it expressly contemplates that the expansive "tribe" definition would operate under Section 5.

[20]We do not suggest that blood quantum was not or could not be considered in making decisions about tribes. Although it has dispensed with the inquiry in its modern acknowledgment rules, the OIA did consider "racial" Indianness, alongside political and ethnographic evidence, in deciding whether to accept IRA applications. But it was aware that applying a quantum cut-off on a group basis raised conceptual, as well as practical, difficulties.

support petitioners' account of Congress's intent. The "tribes" that prompted Commissioner Collier's proposal were ones that, by Senator Wheeler's account, *were* federally protected in June 1934, but should not have been – unnamed "Northern California tribes" who, the Senator said, were "at the present time * * * * under the supervision of the Government of the United States," though "no more Indian than you or I." Senator Wheeler urged that "sooner or later," "their lands ought to be turned over to them in severalty and divided up." The "date of enactment" restriction petitioners urge makes no sense as a way to get at that problem – indeed, it would require BIA to provide assistance to this group in perpetuity.[21]

Indeed, even if "future recognition" had been a concern, it would be fanciful to assert that the 73rd Congress meant to address the specific situation presented here: *i.e.*, a tribe found to have been in continuous existence for hundreds of years, *i.e.*, one that effectively has been determined *should have been* under federal protection in 1934. See General Accounting Office Report, No. GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process*, Appendix I, at 24 (Nov. 2001) ("The essential

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[21]Although Senator Wheeler had, at an earlier point in the hearing, indicated an interest in excluding the Catawba from the Act's reach, Senator O'Mahoney had explained that their inclusion followed from the Act's "tribe" definition and that an exclusion – a result that both he and Senator Thomas made clear they would oppose – would require altering *that* definition, *id.* at 266, a step that the Committee (and Congress) did not take. When the "now under * * *" language was added, to the "*Indian*" definition, the discussion had moved on to a different – and evidently less controversial – concern of Senator Wheeler's, *i.e.*, the "California Indians."

prerequisite for recognition is the tribe's continuous existence as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes."); see 290 F. Supp. 2d at 180 ("there can be no serious dispute concerning the Narragansett's tribal status in 1934"); 48 Fed. Reg. at 6178 ("[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications" and have a "documented history dating from 1614").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Sean H. Donahue
DONAHUE & GOLDBERG, LLP
2000 L St, NW, Suite 808
Washington, D.C. 20036
(202) 466-2234

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Counsel for *Amici Curiae*

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v.

DIRK KEMPTHORNE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF LAW PROFESSORS SPECIALIZING IN FEDERAL INDIAN LAW AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

ROBERT T. ANDERSON
Associate Professor
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 685-2861

RICHARD A. GUEST
Staff Attorney
Counsel of Record
NATIVE AMERICAN
RIGHTS FUND
1712 N. St., NW
Washington, D.C. 20036
(202) 785-4166

COLETTE ROUTEL
Visiting Assistant Professor
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109
(734) 763-6699

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. CONGRESS INTENDED THAT THE IRA APPLY TO INDIAN TRIBES RECOGNIZED BY THE FEDERAL GOVERNMENT AT THE MOMENT THE ACT WAS INVOKED	7
A. In 1934, There Was No Bright-Line Distinction Between "Recognized" And "Unrecognized" Tribes, There Was No Official List Of Indian Tribes, And No Formal Process Existed For Making Recognition Decisions	8
B. The Legislative History Of The IRA Suggests That The Language Invoked By Petitioners Was Intended To Recognize The Changing Nature Of Tribal Status	13
II. THE DEPARTMENT SHOULD NOT BE COMPELLED TO ADOPT THE PETITIONERS' INTERPREATION OF THE IRA, WHICH WOULD ONLY CODIFY PAST AGENCY MISTAKES	22
CONCLUSION	37

TABLE OF AUTHORITIES

Page

CASES

Bryan v. Itasca County, 426 U.S. 373 (1976) 36

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 13

Dred Scott v. Sandford, 60 U.S. 393 (1856) 16

Eastern Band of Cherokee Indians v. United States, 117 U.S. 288 (1886) 15

Elk v. Wilkins, 112 U.S. 94 (1884) 16

Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan, 369 F.3d 960 (6th Cir. 2004) 34

Grand Traverse Band v. U.S., 198 F. Supp. 2d 920 (W.D. Mich. 2002) 35

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The Kansas Indians, 72 U.S. 737 (1866) 11

Montoya v. United States, 180 U.S. 261 (1901) 12

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TABLE OF AUTHORITIES – Continued

Page

Stillaguamish Tribe v. Kleppe, No. 75-1718 (Sept. 24, 1976) 27

United States v. Candelaria, 271 U.S. 432 (1926) 12, 19

United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965) 36

United States v. Holliday, 70 U.S. 407 (1865) 10, 11

United States v. Joseph, 94 U.S. 614 (1876) 17, 19

United States v. Kopp, 110 F. 160 (D. Wash. 1901) 16

United States v. Lara, 541 U.S. 193 (2004) 13

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) 34

United States v. Wright, 53 F.2d 300 (4th Cir. 1931) 15

United States v. Sandoval, 231 U.S. 28 (1913) 16, 17, 18, 19

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CONSTITUTIONS, TREATIES, STATUTES AND REGULATIONS

U.S. Const., Art. 8, cl. 3 18

Articles of Confederation, Art. 9, para. 4 10

Treaty of Fort Pitt, 7 Stat. 13 (Sept. 17, 1778) 13

TABLE OF AUTHORITIES – Continued

Page

Treaty with the Kickapoo, 13 Stat. 623 (June 28, 1862) 14

Treaty with the Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836) 33, 34

Treaty with the Ottawa and Chippewa, 11 Stat. 621 (July 31, 1855) 34, 35

Treaty with the Ottawa of Blanchard's Fork, 12 Stat. 1237 (June 24, 1862) 14

Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856) 14

Treaty with the Wyandott, 10 Stat. 1159 (Jan. 31, 1855) 14

25 U.S.C. § 177 26

25 U.S.C. § 461 et seq. 3, 6

25 U.S.C. § 479a-1 ..... *passim*

Act of Apr. 18, 1796, ch. 13, 1 Stat. 452 10

Act of June 30, 1834, ch. 161, § 11, 4 Stat. 729 ..... 9, 16

Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574 17

Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71 10

Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557 18

Act of June 18, 1934, ch. 576, §§ 16, 17, 18, 48 Stat. 984 23

Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2938 23

TABLE OF AUTHORITIES – Continued

Page

Act of Nov. 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791 36

The Indian Trade & Intercourse Acts

Act of July 22, 1790, ch. 33, 1 Stat. 137 9

Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 9

Act of May 19, 1796, ch. 30, 1 Stat. 469 9

Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 9

Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 9

Act of May 6, 1822, ch. 58, 3 Stat. 682 9

Act of June 30, 1834, ch. 161, 4 Stat. 729 ..... 9, 16

Act of June 17, 1844, ch. 103, 5 Stat. 680 9

Act of Mar. 3, 1847, ch. 66, 9 Stat. 203 9

Act of Feb. 13, 1862, ch. 24, 12 Stat. 338 9

Act of Mar. 16, 1864, ch. 34, 13 Stat. 29 9

Indian Depredation Act, Act of Mar. 3, 1891, ch. 9538, § 1, 26 Stat. 851 9

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The Snyder Act, Act of Nov. 2, 1921, ch. 115, 42 Stat. 208 10

25 C.F.R. Part 83 ..... 6, 8, 28, 29, 30

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TABLE OF AUTHORITIES – Continued

Page

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43 Fed. Reg. 39,361 (Sept. 5, 1978) 6, 28

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45 Fed. Reg. 19,321 (Mar. 25, 1980) 35

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59 Fed. Reg. 9,280 (Feb. 25, 1994) 22, 28

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67 Fed. Reg. 607 (Jan. 4, 2002) 32

72 Fed. Reg. 13,648 (Mar. 22, 2007) 9, 15

72 Fed. Reg. 67,951 (Dec. 3, 2007) 30

73 Fed. Reg. 30,146 (May 23, 2008) 28

73 Fed. Reg. 31,140 (May 30, 2008) 30

73 Fed. Reg. 31,142 (May 30, 2008) 30

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TABLE OF AUTHORITIES – Continued

Page

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Journals of the Continental Congress 602 (Sept. 22, 1783) 10

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H.R. Rep. No. 103-781, 103rd Cong. 2d Sess. (1994) 8

S. Rep. 100-577 (1988) 23

S. Rep. 103-266, 103rd Cong., 2nd Sess. 1994, 1994 WL 213263 22

MISCELLANEOUS

American Indian Policy Review Commission, Final Report (May 17, 1977) 5, 25

Historical Technical Report, Cowlitz Indian Tribe 33

TABLE OF AUTHORITIES – Continued

Page

Letter from Assistant Commissioner of Indian Affairs William Zimmerman to Chairman of the Constitutional Committee of the Saginaw Chippewa Indians (July 31, 1936).....24

Letter from John Collier to Lewis Layton (Oct. 25, 1933).....32

Letter from Secretary Hubert Work, Department of the Interior, to the Honorable J.W. Harreld, Chairman, Senate Committee on Indian Affairs (March 28, 1924).....32

Recommendation and summary of evidence for proposed finding for Federal acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians, Peshawbestown, Michigan pursuant to 25 C.F.R. 54 (Oct. 3, 1979).....35

Solicitor's Opinion M-34989, 1947 WL 7215 (1947).....15

Task Force Ten: Terminated and Nonfederally Recognized Indians, Final Report to the American Indian Policy Review Commission (October 1976).....25

INTEREST OF THE *AMICUS CURIAE*[1]

Amici are the following law professors who write and teach in the area of Federal Indian law:

Robert T. Anderson, Associate Professor of Law, Director of Native American Law Center, University of Washington

Bethany Berger, Professor of Law, University of Connecticut

Matthew L.M. Fletcher, Associate Professor of Law & Director of Indigenous Law & Policy Center, Michigan State University College of Law

Carole E. Goldberg, Professor of Law & Director of Joint Degree Program in Law and American Indian Studies, University of California, Los Angeles

Sarah A. Krakoff, Associate Professor of Law, University of Colorado, Boulder

Patrice Kunesh, Associate Professor of Law & Director of the Institute of American Indian Studies, University of South Dakota

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than the *amici* and its counsel contributed monetarily to the preparation or submission of this brief.

John P. LaVelle, Dickason Professor of Law & Director, Indian Law Program, University of New Mexico

Nell Jessup Newton, William B. Lockhart Professor of Law, University of California, Hastings

Colette Routel, Visiting Assistant Professor of Law, University of Michigan

Judith V. Royster, Professor of Law & Co-Director of Native American Law Center, University of Tulsa

Joseph William Singer, Bussey Professor of Law, Harvard Law School

Kevin Washburn, Rosentiel Distinguished Professor of Law, University of Arizona

The *amici* submit this Brief to explain the legal foundation for the federal government's practice of "recognizing" or "acknowledging" a group's existence as an Indian tribe.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 et seq., Act of June 18, 1934, ch. 576, 48 Stat. 984, authorizes the Secretary of the Interior to acquire lands for "Indians," and defines that term to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479 (2008). In their briefs,

each of the Petitioners claim that this language is unambiguous, and applies only to Indian tribes that were both recognized and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. An understanding of the history of federal recognition of Indian tribes, however, makes this interpretation implausible.

Prior to enactment of the IRA, the government had not made any comprehensive effort to catalog Indian tribes. In 1934, therefore, there was no list of recognized tribes to which the scope of the Act could be limited. Nor were there standard criteria for determining whether recognition had been or should be extended to particular Indian groups. Consequently, Congress would not have intended for the phrase "now under federal jurisdiction" to mean tribes "under federal jurisdiction as of June 18, 1934." It knew that *after* the IRA was enacted the Department of the Interior (the "Department") would have to determine which groups to recognize as Indian tribes.

The language relied on by the Petitioners – if it even applies in this case[2] – requires that a tribe be "recognized" and "under federal jurisdiction" at the

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[2] Respondents and *amicus curiae* National Congress of American Indians persuasively argue that Section 5 of the IRA authorizes the Secretary of the Interior to take land in trust for an "Indian tribe or individual Indian," and that the separate definition of "tribe" in the Act plainly includes the Narragansett Indian Tribe. *See* 25 U.S.C. §§ 465, 479a (2008).

moment when the Secretary of the Interior seeks to acquire land in trust on its behalf. This makes sense, because historically tribal status was not static. Some groups considered Indian tribes early in their history were ultimately no longer identified by the federal government as such, because their membership had significantly dwindled in size or had fully assimilated into white society. On the other hand, some groups determined not to be tribes later regained their tribal status. The fluidity of tribal existence made it important that the IRA provide a mechanism that ensured its benefits would only be available for groups that the federal government currently recognized as Indian tribes. Properly read, the definition of "Indian" contains that mechanism.

The legislative history supports this reading of the statute. During hearings on the bill, Senate Indian Affairs Chairman Burton Wheeler expressed concerns that the IRA would apply indefinitely to certain persons who, while under federal supervision in 1934, were "white people essentially." *Hearing Before the Senate Committee on Indian Affairs*, 73rd Cong., 2d Sess., part 2, at 266 (1934). He believed that "you have to sooner or later eliminate those Indians," from the application of the IRA. *Id.* In response, Commissioner of Indian Affairs John Collier suggested that the term "recognized Indian tribe" in the definition of "Indian," be limited by the addition of the phrase, "now under federal jurisdiction." *Id.* This suggestion would only address Senator Wheeler's concerns if "now" was meant to refer to the

moment when the statute was being applied. Then, if at a later date, Congress or the executive branch agreed with his characterization of the Indians in question and chose to terminate the government-to-government relationship with that tribe, it would no longer receive the benefits of the IRA.

At a minimum, this historical context establishes that the IRA's definition of "Indian" is ambiguous, and the Department's interpretation of that term, which is memorialized in formal regulations promulgated after notice and comment, is reasonable and must be upheld. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In fact, it would be unreasonable to adopt the Petitioners' interpretation of the IRA, because doing so would only memorialize past agency mistakes.

After the IRA was passed, the Department of the Interior attempted to decide which tribes would be eligible to vote on and organize under the Act. In its haste, several errors and omissions were made. The 1977 Report of the American Indian Policy Review Commission revealed that dozens of tribes had not been recognized by the federal government due to inadvertence or mistake. At the same time, unrecognized tribes began seeking sovereign status by litigating treaty fishing rights in the Pacific Northwest, filing land claims in the East, and petitioning the Department for federal recognition.

In response, the Department finally created a formal administrative process for recognizing tribes

in 1978. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (codified at 25 C.F.R. Part 83). The first comprehensive list of Indian tribes was published in the *Federal Register* the following year. *See* Indian Tribal Entities that have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7,235 (Feb. 6, 1979). A final list for Alaska tribes was not completed until 1993. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993). All Indian groups not included on these lists were considered "unrecognized," and could generally achieve recognition only through the newly created administrative process or direct congressional legislation. In 1994, Congress ratified these lists and mandated their annual publication. 25 U.S.C. § 479a-1. *See also* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007) (containing the most recent list of federally recognized tribes).

Since 1978, the Department has recognized 16 Indian tribes – including the Narragansett Indian Tribe – through its formal administrative process. To gain recognition, each of these tribes was required to demonstrate that, from historical times to the present, it maintained a continuous existence as a distinct Indian community and exercised political authority over its members. Hence, Indian tribes recently recognized through the administrative

process were existing tribes in 1934; only inadvertence or mistake prevented their immediate recognition under the IRA. The Department's attempts to correct these mistakes should not be thwarted by the Petitioners' unreasonably restrictive reading of the IRA.

ARGUMENT

I. CONGRESS INTENDED THAT THE IRA APPLY TO INDIAN TRIBES RECOGNIZED BY THE FEDERAL GOVERNMENT AT THE MOMENT THE ACT WAS INVOKED

The IRA authorizes the Secretary of the Interior to acquire any interest in lands "for the purpose of providing land for the Indians." 25 U.S.C. § 465 (2008). The term "Indian" is defined as follows:

> The term "Indian" as used in this Act shall include *all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . .

25 U.S.C. § 479 (2008) (emphasis added). The Petitioners claim that the clause highlighted above only applies to Indian tribes that were both recognized

and under federal jurisdiction on June 18, 1934, the date on which the IRA was enacted. That interpretation is inconsistent with both the historical context of the recognition of Indian tribes by the United States and the legislative history of the IRA.

A. In 1934, There Was No Bright-Line Distinction Between "Recognized" And "Unrecognized" Tribes, There Was No Official List Of Indian Tribes, And No Formal Process Existed For Making Recognition Decisions

Today, all Indian tribes fit into one of two categories: "recognized" or "unrecognized."[3] A recognized tribe is entitled to all of the benefits (health, education, etc.) extended by federal law to Indian tribes.[4] Unrecognized tribes, on the other hand, are not entitled to most federal services and can obtain recognition only by prevailing in the difficult and lengthy administrative process contained in 25 C.F.R. Part 83, or, on rare occasion, through congressional legislation. But this bright-lined differentiation between recognized and unrecognized tribes is recent in origin, and began to emerge only with the passage

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[3] The terms "recognized" and "unrecognized" are often used interchangeably with "acknowledged" and "unacknowledged."

[4] *See* H.R. Rep. No. 103-781, at 3 (1994) (noting that recognition imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members).

of the IRA. *See generally* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331 (1990); *Cohen's Handbook of Federal Indian Law* 134-52 (2005 ed.) (discussing history of federal recognition).

For the first 70 years of governance under the Articles of Confederation and U.S. Constitution, there was no concept of "recognized" versus "unrecognized" tribes. In fact, the terms "recognize" and "acknowledge" were almost exclusively used in the cognitive sense, indicating that a particular tribe was known to the United States. Quinn, 34 Am. J. Legal Hist. at 339. Congress enacted legislation that applied to "Indian country,"[5] "Indian tribes," "any band, tribe, or nation in amity with the United States,"[6] "Indian nations,"[7] "Indians,"[8] "Indians not citizens of the

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[5] The Indian Trade & Intercourse Acts referred to "Indians," "Indian tribes," and "Indian country." *See* Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of June 17, 1844, ch. 103, 5 Stat. 680; Act of Mar. 3, 1847, ch. 66, 9 Stat. 203; Act of Feb. 13, 1862, ch. 24, 12 Stat. 338; Act of Mar. 16, 1864, ch. 34, 13 Stat. 29.

[6] *See* Indian Depredation Act, Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851.

[7] The system of government trading houses first authorized through legislation passed in 1796, and renewed from time-to-time until their permanent closure in 1823, established federal trading posts along the frontier or in the "Indian country," so

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United States,"[9] "Indians not members of any of the states,"[10] and the like. It was then up to the executive branch and the federal courts to determine, on an *ad hoc* basis, to whom these statutes should be applied.

If Congress or the executive branch had previously concluded that a tribe existed, federal courts generally refused to disturb that finding. In *United States v. Holliday*, for example, this Court was asked to determine whether federal laws prohibiting the sale of liquor to Indians applied to a Saginaw Chippewa Indian. 70 U.S. 407 (1865). The defendant claimed that the person he sold liquor to should not be considered an Indian for purposes of the statutory prohibition, because his tribe had been dissolved by the United States. *Id.* at 418. The United States, on

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that trade could be honestly conducted with "Indian nations" and "Indians." *See, e.g.*, Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.

[8] *See, e.g.*, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (the Northwest Ordinance); Act of Mar. 3, 1885, § 9, 23 Stat. 385 (the Major Crimes Act); Act of Nov. 2, 1921, ch. 115, 42 Stat. 208 (the Snyder Act).

[9] *See, e.g.*, Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570-71 (prohibiting certain contracts from being entered into with "any tribe of Indians, or individual Indian not a citizen of the United States").

[10] The Articles of Confederation, granted the federal government "the sole and exclusive right and power of . . . regulating trade, and managing all affairs with the Indians, not members of any of the States." Articles of Confederation, Art. 9, para. 4. Proclamations issued by the Continental Congress also used this phrase. *See, e.g.*, 25 Journals of the Continental Congress 602 (Sept. 22, 1783).

the other hand, argued that the Saginaw Chippewa still existed as a tribe. *Id.* at 419. This Court deferred to the executive branch and enforced the statute against the defendant, noting:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

Id. See also The Kansas Indians, 72 U.S. 737, 755 (1866) ("If the tribal organization of the Shawnees is . . . recognized by the political department of the government as existing then they are . . . governed exclusively by the government of the Union").

Situations necessarily arose, however, where neither Congress nor the executive branch had previously acknowledged the existence of a particular tribe. In these cases, federal courts were required to decide whether that group constituted an Indian tribe as defined in particular statutes. This Court eventually provided a definition of the terms "tribe" and "band," to aid lower federal courts in making these determinations:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though

> often, of the same race or tribe, but united under the same leadership in a common design.

Montoya v. United States, 180 U.S. 261, 266 (1901). *See also United States v. Candelaria*, 271 U.S. 432 (1926) (applying the *Montoya* definition to the Indian Trade & Intercourse Acts). Not surprisingly, however, confusion still remained.

By the early twentieth century, the concept of recognition of Indian tribes in the jurisdictional sense "was only beginning to take shape," and it "was not universally applied, accepted or, frankly, understood." Quinn, 34 Am. J. Legal Hist. at 347. No comprehensive list of federally recognized tribes was ever created prior to enactment of the Indian Reorganization Act in 1934,[11] and no standard criteria for determining whether to recognize an Indian tribe existed at the time. It is thus extremely unlikely that Congress would have intended the IRA to be interpreted as suggested by the Petitioners, and it would be extraordinarily difficult, if not impossible, to apply the Act in this manner today.

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[11] In 1894, the U.S. Census Office published a report that included a list of "Principal Tribes known to the Laws of the United States," but as its name indicates, this was not a comprehensive listing of Indian tribes. *See Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890* (1894). This report was not updated, and no other list of Indian tribes was created by the federal government prior to enactment of the IRA.

B. The Legislative History Of The Ira Suggests That The Language Invoked By Petitioners Was Intended To Recognize The Changing Nature Of Tribal Status

Petitioners' suggest that Congress intended to fix tribal status at the moment of enactment of the IRA, but this argument contradicts both the historically fluid nature of tribal status and recognition, and the legislative history of the provision.

Tribal status has never been static. History provides numerous examples of congressional and judicial decisions reversing previous determinations of the status of individual tribes. *See United States v. Lara*, 541 U.S. 193, 202 (2004). While at times, federal policy reflected the notion that Indian tribes would be permanent fixtures within the United States,[12] for the most part, it assumed that Indians

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[12] An early treaty with the Delaware Nation raised the possibility that Indian tribes might eventually join the United States, "to form [an Indian] state whereof the Delaware nation shall be the head, and have a representation in Congress." Treaty of Fort Pitt, 7 Stat. 13 (Sept. 17, 1778). Later, some suggested that an Indian state should be created in that portion of the Indian Territory that is now the State of Oklahoma. *See, e.g.*, Cong. Globe, 41st Cong., 3d Sess. 734 (1871) (statement of Ohio Representative Garfield). These proposals, however, never gained widespread support despite the direct promises made to certain tribes. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970) (noting that in the 1830 Treaty of Dancing Rabbit Creek, "the United States pledged itself to secure to the Choctaws the 'jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the

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would eventually fully assimilate into white society and abandon their tribal relations.

During the mid-1800s, the United States sought to convince certain "civilized" tribes to voluntarily abandon their tribal relations through specific treaty provisions. One such provision was contained in an 1855 treaty with the Wyandott:

> The Wyandott Indians having become sufficiently advanced in civilization ... it is hereby agreed and stipulated, that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement ... and from and after the date of such ratification, the said Wyandott Indians, and each and every of them ... shall be deemed, and are hereby declared, to be citizens of the United States ...

Treaty with the Wyandott, 10 Stat. 1159 (Jan. 31, 1855). *See also* Treaty with the Ottawa of Blanchard's Fork, 12 Stat. 1237 (June 24, 1862) (same). Few tribes agreed to these provisions.[13] Furthermore,

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government of the Choctaw Nation ... and that no part of the land granted them shall ever be embraced in any Territory or State.'").

[13] Additionally, treaties containing these provisions nearly always provided tribal members with the option of severing tribal relations and obtaining U.S. citizenship, or remaining tribal members. *See, e.g.*, Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856); Treaty with the Kickapoo, 13 Stat. 623 (June 28, 1862).

many who did still continued to operate in their traditional ways. While these tribes may have been considered disbanded for a short period of time, the United States often reestablished the government-to-government relationship upon realization that a tribal organization remained intact.[14]

More common was the loss of tribal status as tribal members became civilized. For decades, the federal government considered *individual* tribal members to no longer be wards of the federal government once they became citizens of the United States, or appeared to abandon their tribal allegiance by living within white settlements. *See, e.g., United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695

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[14] For example, in the 1830s, the Cherokee Nation was removed from its eastern homeland and relocated west of the Mississippi River. Those tribal members who were adverse to removal were, by terms of the treaty, permitted to remain provided that they were ready for and agreed to state citizenship. This Court determined in *Eastern Band of the Cherokee Indians v. United States*, that the approximately 1,200 Indians who refused to remove "ceased to be part of the Cherokee nation, and henceforth they became citizens of and were subject to the laws of the state in which they resided." 117 U.S. 288, 303 (1886). Later, however, federal courts noted that these Indians had "continued . . . their tribal life" and "gradually they were restored to . . . their former status as an Indian tribe under the protection of the United States." *United States v. Wright*, 53 F.2d 300, 303 (4th Cir. 1931). The Eastern Cherokee were permitted to vote on acceptance of the IRA in 1934, and remain a federally recognized tribe today. Solicitor's Opinion M-34989, 1947 WL 7215 (1947); Indian Entities Recognized, 72 Fed. Reg. at 13,649 (listing Eastern Band of Cherokee Indians of North Carolina).

(C.C.D. Neb. 1879); *United States v. Kopp*, 110 F. 160 (D. Wash. 1901).[15] Later, tribes themselves ceased to be under federal jurisdiction during periods of time when their membership as a whole was considered to have fully assimilated into white society.

The Pueblo Indians provide an excellent historical example of this concept. The Indian Trade & Intercourse Act of 1834 provided, in part, that "if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any *Indian tribe* . . . such offender shall forfeit and pay the sum of one thousand dollars." Act of June 30, 1834, ch. 161, § 11, 4 Stat. 729, 730 (emphasis added). Not long after the United States

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[15] *See also Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) ("if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people"); Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 Const. Comment. 555 (2000) (describing the confusion that existed in the 1800s regarding the status of individual Indians who owned allotments or had abandoned tribal relations). Ultimately, in *Elk v. Wilkins*, this Court concluded that an individual Indian could not obtain U.S. citizenship simply by voluntarily separating himself from his tribe and attempting to vote in state elections. 112 U.S. 94 (1884). Yet even after *Elk*, many federal officials believed, with the backing of lower court decisions, that if Indians were granted U.S. citizenship through treaty provisions or congressional legislation they were no longer wards of the federal government. It was not until *United States v. Sandoval* that this Court clarified that U.S. citizenship and wardship status were not incompatible. 231 U.S. 28 (1913).

acquired a large swath of land from Mexico in the Treaty of Guadalupe Hidalgo, Congress enacted another statute, which clarified that the Trade & Intercourse Acts "extended over the *Indian tribes* in the Territories of New Mexico and Utah." Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574, 587 (emphasis added). Both of these statutes were implicated in *United States v. Joseph*, when the federal government brought suit against a defendant who had settled on lands belonging to the Taos Pueblo. 94 U.S. 614 (1876). This Court was called upon to determine whether that Pueblo constituted an "Indian tribe" for the purpose of these acts.

The New Mexico Pueblos had been appointed a federal Indian agent to manage their affairs, but the Court believed that the "character and history" of the Indians was more important to determining whether they constituted a tribe. After reviewing the findings of the Supreme Court of the Territory of New Mexico, it concluded that the Pueblo Indians were a peaceful, sedentary, Christian people, whose livelihood revolved around agriculture. *Joseph*, 94 U.S. at 616-17. They were "Indians only in feature, complexion, and a few of their habits." *Id.* at 616. They had been fully assimilated in western society, were now civilized, and therefore, no longer constituted an "Indian tribe." *Id.* at 617. If the defendant was indeed trespassing on Pueblo lands, he could only be punished by a suit under the laws of the Territory. *Id.* at 619.

Forty years later, however, this Court reexamined the condition of the Pueblo Indians and arrived

at a very different conclusion. *United States v. Sandoval* involved a criminal prosecution for distributing alcohol within the boundaries of the Santa Clara Pueblo. 231 U.S. 28 (1913). Federal law prohibited the introduction of alcohol in Indian country, and the New Mexico enabling act provided that "the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557. The Court was thus presented with a statute that, by its explicit terms, applied to the Pueblo Indians. But did Congress have the power to enact such a statute? After all, the Constitution only gave Congress the authority to "regulate commerce . . . with the *Indian tribes*." U.S. Const., Art. 8, cl. 3.

This Court began once again by examining the character and nature of the Pueblos. This time, however, it noted that the Indians, "always living in separate and isolated communities," were "largely influenced by superstition and fetichism," and were "essentially a simple, uninformed, and inferior people." *Sandoval*, 231 U.S. at 39. Quoting extensively from published reports, the Court emphasized that the Pueblo Indians had not, as previously believed, adopted Christianity. They still practiced their "pagan" religion, refused to give up their "secret dances," and recognized their own traditional form of government. *Id.* at 41-44. In light of this information, the Court concluded, Congress was well within its power

when it legislated on behalf of the Pueblo Indians. While Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe," so long as they were "distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 47.[16]

Thus, tribal status was viewed as fluid. Historic Indian tribes that maintained governmental control over their members would continue to be dealt with as tribes and fall under federal jurisdiction. Fully assimilated members or tribes would no longer be dealt with as such. However, the determination of which tribes existed was largely left to Congress and the Executive.

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[16] The *Sandoval* Court distinguished *Joseph* by claiming that the Trade & Intercourse Acts were not as comprehensive as the legislation prohibiting distribution of liquor within Indian country, and noting that the observations about the Pueblo Indians' progress towards civilization, which were taken from the Territorial court's opinion, had now been proven to be incorrect. *Sandoval*, 231 U.S. at 48-49. But these distinctions did not last for long. In *United States v. Candelaria*, this Court overruled its decision in *Joseph* by holding that the Pueblo Indians were "wards of the United States" and "Indian tribes" within the scope of the Trade & Intercourse Acts. 271 U.S. 432 (1926).

This history is essential to understanding the IRA's definition of "Indian." As originally drafted, this definition was to include "all persons of Indian descent who are members of any recognized Indian tribe." Senate Indian Affairs Chairman Burton Wheeler, however, was concerned that this provision was too broad. He stated:

> *Chairman*. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Hearing Before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., part 2, at 266 (1934). Wheeler obviously believed that once Indians had fully assimilated into white society, they should no longer be afforded the protection of the IRA even if they were currently under federal jurisdiction.

Commissioner of Indian Affairs John Collier responded to this suggestion, stating:

> *Commissioner Collier.* Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction." That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Id. It is as a result of this very exchange that the phrase at issue in this case was added to the IRA. In suggesting this language, Collier obviously intended that, if at a later date, Congress or the Executive Branch agreed with Senator Wheeler's characterization of the Indians in question, and chose to terminate the government-to-government relationship with that tribe, it would no longer receive the benefits of the IRA. Thus, "now" must refer to the date on which the Secretary of the Interior attempts to exercise his or her authority under the Act.

Petitioners' argument regarding the statutory language, therefore, is exactly backwards. The definition of Indians was not intended to fix tribal status according to its understanding in 1934, but rather to ensure that the tribes to which it would be applied would shift with the changing status of Indian tribes. Indian groups that had once been recognized, but since lost tribal status, would not be subject to the Act. But groups like the Narragansett, who had maintained their tribal status, and who later gained formal recognition, would.

II. THE DEPARTMENT SHOULD NOT BE COMPELLED TO ADOPT THE PETITIONERS' INTERPRETATION OF THE IRA, WHICH WOULD ONLY CODIFY PAST AGENCY MISTAKES

There was no comprehensive list of federally recognized Indian tribes in June 1934. It was only *after* the Act was passed that Commissioner Collier was given the daunting task of determining which Indian groups were or should be recognized by the federal government and permitted to organize and vote on application of the Act. Collier hastily complied a list of 258 groups. Quinn, 34 Am. J. Legal Hist. at 356. This list is universally recognized to include serious omissions,[17] and these mistakes should not be enshrined in the IRA.

Nearly all of Commissioner Collier's mistakes involved landless Indian tribes. This was no

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[17] Both the executive branch and Congress have repeatedly acknowledged that inaccurate recognition decisions were made in the 1930s. *See, e.g.*, Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9281 (Feb. 25, 1994) ("the studies of unrecognized groups made by the Government in the 1930's were often quite limited and inaccurate. Groups known now to have existed as tribes then, were portrayed as not maintaining communities or political leadership, or had their Indian ancestry questioned"); S. Rep. 103-266 (1994) (when deciding to extend recognition to the Pokagon Band of Potawatomi Indians of Michigan, noting that "[t]he arbitrary fashion by which the United States extended federal recognition to Indian tribes located in the Great Lakes region . . . is unfortunately quite clear").

coincidence. The IRA, as originally enacted, only provided the right to organize a constitutional government, charter a corporation, or vote on application of the Act to any "Indian tribe, or tribes, residing on the same reservation." Act of June 18, 1934, ch. 576, §§ 16, 17, 18, 48 Stat. 984.[18] Thus, Commissioner Collier logically began determining recognized tribes by referring to lists of federal land holdings set apart for Indians. For these reservation tribes, even if he mistakenly believed that they no longer maintained tribal relations, this error could be immediately remedied, because the definition of "Indian" in the IRA also included descendants of previously recognized tribes that resided within the boundaries of an Indian reservation on June 1, 1934. 25 U.S.C. § 479 (2008). Consequently, despite unrecognized status, their existing reservation permitted these Indians to organize under the IRA and immediately regain recognition.[19]

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[18] The reservation requirement was deleted from the IRA by Congress in 1988. Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2938. *See also* S. Rep. 100-577 (1988) ("The amendment deletes reference to residence on a reservation and eliminates reservation status or ownership of a tribal land base as a condition precedent to organization under the Act").

[19] The Saginaw Chippewa Indian Tribe of Michigan have a history that is similar to that of the Grand Traverse Band of Ottawa & Chippewa Indians, described at 36-38 *infra*. The only difference is that the Saginaw Chippewa Tribe maintained a six-township reservation in Isabella County, Michigan. Therefore, its members were permitted to organize under the IRA as "descendants of members of a recognized tribe" residing on the

(Continued on following page)

Landless Indian tribes had no comparable escape hatch. Although the IRA provided for the creation of "new Indian reservations," 25 U.S.C. § 467 (2008), thus indicating a congressional understanding that landless tribes could take advantage of the Act, the *ad hoc* nature of recognition resulted in many of these tribes being overlooked. For those tribes that did come to the attention of the Department, if Commissioner Collier mistakenly determined that the tribe was no longer in existence, acquisition and reorganization was only possible for half-blood members. 25 U.S.C. § 479 (2008). Because of limited resources, the Department formed fewer than ten half-blood communities.[20] Thus, a wrong recognition decision almost always proved fatal for landless tribes.

Fortunately, many recognition mistakes have been rectified since the 1930s. Indian tribes have been recognized through congressional legislation, *see* Appendix 1, and informal actions of the Executive Branch, *see* Appendix 2. Since 1978, new recognition

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same reservation. *See, e.g.*, Letter from Assistant Commissioner of Indian Affairs William Zimmerman, Jr. to Chairman of the Constitutional Committee of the Saginaw Chippewa Indians (July 31, 1936).

[20] The Department allowed the following groups to form as half-blood communities in the years immediately following enactment of the IRA: the St. Croix Chippewa Indians of Wisconsin, the Mississippi Band of Choctaw Indians, the Quartz Valley Indian Community, the Duckwater Shoshone Tribe, the Yomba Shoshone Tribe, the Port Gamble Indian Community, and the Sokaogon Chippewa Community. *Cohen's Handbook of Federal Indian Law* 152 n.105 (2005 ed.).

decisions have also been made through the formal administrative agency procedures described below, *see* Appendix 3.

In 1975, Congress created the American Indian Policy Review Commission, which was charged with conducting the first comprehensive review of Indian affairs in almost 50 years. The Commission established task forces to consider major issues affecting tribes. One of those task forces focused on the formal recognition of Indian tribes.[21] After two years of study, in its Final Report, the Commission identified dozens of tribes that had not been recognized by the federal government simply due to bureaucratic oversight.[22] It recommended that a special office be established within the Bureau of Indian Affairs to determine the tribal status of any groups that petitioned for federal recognition.

At the same time, many unrecognized tribes began pursuing litigation to restore their sovereign rights and natural resources. In *United States v. Washington*, the Ninth Circuit determined that Indian tribes in the Pacific Northwest that exercised treaty fishing rights – including certain unrecognized tribes – were entitled to half of the commercial fish

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[21] *See generally* Task Force Ten: Terminated and Nonfederally Recognized Indians, Final Report to the American Indian Policy Review Commission (October 1976).

[22] American Indian Policy Review Commission, 1 Final Report 8, 37, 462 (May 17, 1977).

catch in the State of Washington.[23] 520 F.2d 676, 692-93 (9th Cir. 1975). The court held that the federal government's recognition decisions could "have no impact on vested treaty rights." *Id.* at 693. So long as an unrecognized tribe could establish that it was a party to one or more of the treaties in question, if the court independently concluded that the tribe had "maintained an organized tribal structure," it would be permitted to exercise its fishing rights. *Id.*

Likewise, on the other side of the United States, the First Circuit decided *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In that case, an unrecognized tribe claimed that thousands of acres of land in Maine had been transferred to the state without compliance with the Indian Trade & Intercourse Acts, *see* 25 U.S.C. § 177, and therefore, the United States was required to bring suit against the State to assist the tribe in recovering that land. *Id.* at 372. The court sided with the Tribe, and rejected the United States' contention that it had no such duty because the Passamaquoddy Tribe was unrecognized. Noting that no one had challenged the historic or modern existence of the Tribe, the First Circuit concluded that the actions

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[23] The unique history of treaty negotiations in the State produced several landless Indian tribes that were overlooked or mistakenly denied federal recognition following adoption of the IRA. *See* Frank W. Porter III, *In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington*, 14(2) American Indian Quarterly 113 (1990).

complained of fell within the scope of the Act, and the federal government owed a trust responsibility to the Tribe. *Id.* at 373, 376-78, 379.

Encouraged by the Commission's work and these litigation successes, many unrecognized Indian tribes began petitioning the BIA for federal recognition. The sheer number of petitions, along with federal court opinions mandating that the BIA render decisions on those petitions in a prompt manner,[24] led the Department of the Interior to promulgate proposed recognition regulations.[25] On September 5, 1978, after 400 meetings, hearings and conversations with interested parties, and after responding to the written comments of historians, anthropologists, tribal leaders, congressional staff members and others, final "Procedures for

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[24] For example, in 1974, the Stillaguamish Tribe filed a petition with the Bureau of Indian Affairs requesting federal recognition. When the BIA failed to take any action on this petition for more than one year, the Tribe brought suit in federal district court in Washington D.C. In *Stillaguamish v. Kleppe*, No 75-1718 (Sept. 24, 1976), the court ordered the BIA to issue a decision on the Tribe's petition within 30 days. As a result of this ruling, the BIA formally recognized the Stillaguamish Tribe in 1976.

[25] Publication of the draft regulations was accompanied by a statement acknowledging that "[t]he recent increase in the number of [petitions for federal recognition] . . . necessitates the development of procedures to enable that a uniform and objective approach be taken to their evaluation." Procedures Governing Determination that Indian Group is Federally Recognized Indian Tribe, 42 Fed. Reg. 30,647 (June 16, 1977). *See also* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,743 (June 1, 1978).

Establishing that an American Indian Group Exists as an Indian tribe" were published in the Federal Register. 43 Fed. Reg. 39,361 (Sept. 5, 1978).

As amended[26] and codified at 25 C.F.R. Part 83, these regulations have created an elaborate process governing the federal recognition of Indian tribes. An Indian tribe seeking federal recognition must submit a letter of intent, 25 C.F.R. § 83.4, and ultimately, a petition containing thorough explanations and supporting documentation, 25 C.F.R. § 83.6 (2008), demonstrating that the tribe satisfies each of the following criteria:

1. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

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[26] The recognition regulations were amended in 1994 to specify the types of evidence that will be accepted to establish the two most troublesome criteria: tribal community and political influence. The 1994 amendments also attempted to increase the speed at which petitions were processed and lessen the proofs required for tribes that were previously acknowledged by the federal government. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9,280 (Feb. 25, 1994). The Department has also announced various changes in its internal procedures for processing petitions. Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7,052 (Feb. 11, 2000); Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, 73 Fed. Reg. 30,146 (May 23, 2008). *See also Cohen's Handbook of Federal Indian Law* 154-163 (2005 ed.) (reviewing history of the post-1978 acknowledgment process).

2. A predominant portion of the petitioning group has existed as a distinct community from historical times until the present;

3. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

4. The petitioner's membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity; and

5. The membership of the petitioning group is composed principally of persons who are not members of any other recognized Indian tribe.

25 C.F.R. § 83.7 (2008).[27] Voluminous documentary evidence is required to satisfy these criteria. In fact, petitions for recognition take years to assemble and are typically supported by thousands of pages of historical documentation and expert reports.

The Office of Federal Acknowledgment – which has several research teams, each consisting of a cultural anthropologist, genealogical researcher, and an historian – evaluates these petitions, along with

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[27] The petitioning group is also required to present a copy of its current governing document and membership criteria. 25 C.F.R. § 83.7 (2008) The requirements are slightly different for tribes that can demonstrate "unambiguous previous Federal acknowledgment." *See* 25 C.F.R. § 83.8 (2008).

any information presented by other interested parties.[28] While Commissioner Collier spent less than one year determining the status of nearly every tribe in the continental United States, an OFA team routinely spends one year or more on *each* documented petition before making a recommendation to the Assistant Secretary of Indian Affairs. After reviewing OFA's recommendations, the Assistant Secretary will publish a final determination in the Federal Register. Since 1978, the Executive Branch has used this process to grant recognition to 16 Indian tribes – including the Narragansett Indian Tribe – and deny recognition to 24 Indian tribes, *see* Appendix 3 & 4.[29]

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[28] Notice that the OFA has received a letter of intent and/or documented petition is published in the Federal Register to inform interested parties that they may submit factual or legal arguments in support of or in opposition to the petitioner's request for acknowledgment. In addition, the governor and attorney general of the state in which a petitioner is located are specifically notified in writing. 25 C.F.R. § 83.9 (2008). Requests for recognition are often greeted with aggressive opposition. For example, the Connecticut Attorney General submitted eleven thick volumes of data and documents in opposition to the recognition request of the Mohegan Tribe.

[29] The Department recently published findings proposing to deny acknowledgment for three additional tribes. Amended Proposed Finding Against Acknowledgment of the Pointe-au-Chien Indian Tribe of Louisiana, 73 Fed. Reg. 31,142 (May 30. 2008); Amended Proposed Finding Against Acknowledgment of the Biloxi Chitimacha Confederation of Muskogees, Inc. of Louisiana, 73 Fed. Reg. 31,140 (May 30, 2008); Proposed Finding Against Acknowledgment of the Juaneno Band of Mission Indians, 72 Fed. Reg. 67,951 (Dec. 3, 2007).

These recognition decisions have definitively revealed several of Commissioner Collier's mistakes. For illustrative purposes, two such mistakes are described below:

1. *Cowlitz Indian Tribe.* The Cowlitz were recognized by the federal government throughout the mid-to-late 1800s. One unambiguous expression of this recognition occurred in 1855, when the first territorial governor of Washington, Isaac Stevens, commenced treaty negotiations with the "Upper and Lower Chehalis, *Cowlitz*, Lower Chinnook, Quinault and Queets Indians." *See Simon Plamondon, on Relation of the Cowlitz Tribe of Indians v. United States*, 21 Ind. Cl. Comm. 143, 167 (1969) (emphasis added). During these negotiations, the Cowlitz expressed a willingness to cede certain of its lands in exchange for the right to settle on a reservation also being requested by the Upper Chehalis Tribe. *Id.* at 168-69. But Governor Stevens was unwilling to provide the requested reservation, and therefore, no treaty was ever consummated. *Id.* at 169. By the early twentieth century, white settlers had flooded the area and the Cowlitz were disposed of their aboriginal lands.

During the 1920s and 1930s, the federal government ceased recognizing the Cowlitz Tribe, wrongly believing that it no longer maintained its governmental structure and had fully assimilated into white society. For example, in a 1924 letter to the Chairman of the Senate Committee on Indian Affairs, the Secretary of the Interior wrote that "the Cowlitz Indians

are without any tribal organization, are generally self-supporting, and have been absorbed into the body politic." Letter from Secretary Hubert Work, Department of the Interior, to the Honorable J.W. Harreld, Chairman, Senate Committee on Indian Affairs (Mar. 28, 1924).[30] Statements such as these seem to have been made after little to no investigation into the current circumstances of the Tribe. Nevertheless, the Cowlitz were not recognized by the federal government when the Indian Reorganization Act was enacted.

In 1975, the Tribe filed a petition seeking federal recognition. Twenty-five years later, the Department finally extended formal recognition to the Cowlitz Indian Tribe. Final Determination to Acknowledge the Cowlitz Tribe, 65 Fed. Reg. 8,436 (Feb. 18, 2000); Reconsidered Final Determination for Federal Acknowledgment of the Cowlitz Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002). This recognition decision was accompanied by copious documentation and analysis, including more than 400 pages of technical reports prepared by employees at the OFA. The Department concluded that "the Cowlitz petitioner can trace an unbroken line of leaders and a relatively unchanging membership" for more than 100 years. 65 Fed. Reg. at

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[30] Likewise, in 1933, Commissioner Collier wrote that "[n]o enrolments [sic] are now being made with the remnants of the Cowlitz tribe which in fact, is no longer in existence as a communal entity." Letter from John Collier to Lewis Layton (Oct. 25, 1933).

8,437. These and other findings establish that the Department was mistaken when, in the 1920s and 1930s, it claimed that the Tribe no longer maintained its "tribal organization."[31]

2. *Grand Traverse Band of Ottawa & Chippewa Indians*. In the 1800s, the Ottawa and Chippewa Indians in Michigan consisted of several autonomous tribes or bands, connected by a similar culture and language. For ease in obtaining large land cessions, however, the federal government gathered together these individual bands – including the Grand Traverse Band – when negotiating treaties, and simply referred to them collectively as "the Ottawa and Chippewa nation of Indians." Treaty with the Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836). This grouping of independent bands proved problematic during treaty negotiations in 1855.

During the 1855 negotiations, the Michigan Ottawa and Chippewa bands insisted on negotiating as independent groups, with the Lower Peninsula Ottawa and Chippewa bands separate from the Upper Peninsula Chippewa bands. The Indian negotiators further

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[31] During the period when Secretary Work and Commissioner Collier claimed that the Cowlitz Indian Tribe was "without any tribal organization," the Historical Technical Report prepared by the OFA notes that the Tribe was actually governed by a three-member council. This fact was independently corroborated by several contemporary newspaper articles announcing the results of tribal elections. Historical Technical Report, Cowlitz Indian Tribe 135-37.

requested that the federal government dissolve the fictitious Ottawa and Chippewa "nation." Commissioner of Indian Affairs George Manypenny, who was the lead federal negotiator for this treaty, responded to these requests by including Article 5 of the 1855 Ottawa Chippewa Treaty, which provided that "[t]he tribal organization of the said Ottawa and Chippewa Indians . . . is hereby dissolved." Treaty with the Ottawa and Chippewa, 11 Stat. 621 (July 31, 1855). This provision was intended only to correct the federal understanding of the separate political functioning of the individual bands. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 961 n.2 (6th Cir. 2004) ("*GTB II*"); *United States v. Michigan*, 471 F. Supp. 192, 247-48 (W.D. Mich. 1979).

Yet in the 1870s, long after Commissioner Manypenny had left office, the Secretary of the Interior misinterpreted Article 5 to provide for the dissolution of the individual bands. He therefore decreed that upon completion of the annuity provisions contained in the treaty "tribal relations will be terminated." In 1872, the federal government ceased to recognize the signatories to the 1836 and 1855 treaties, including the Band, and withdrew all government services. *See, e.g.*, *GTB II*, 369 F.3d at 961 n.2. The Grand Traverse Band remained unrecognized in 1934, when the IRA was enacted.

In 1980, the Grand Traverse Band became the first tribe to be recognized under the Department of

Interior's newly promulgated recognition regulations. In recognizing the Band, the Department acknowledged that it had misread provisions of the 1855 Treaty. *See* Memo from Acting Deputy Commissioner to Assistant Secretary, "Recommendation and summary of evidence for proposed finding for Federal acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians, Peshawbestown, Michigan pursuant to 25 C.F.R. 54" (Oct. 3, 1979) ("The 'Ottawa and Chippewa Tribes' were a creation of the Federal government. In 1836 these tribes were 'created' in order to sign a treaty with them. The Treaty of 1855 dissolved this legal fiction."). The Department also determined that the Grand Traverse Band existed continuously and "autonomously since first contact, with a series of leaders who represented the band in its dealings with outside organizations, and who both responded to and influenced the band in matters of importance."[32] Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa & Chippewa as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

The Petitioners ask this Court to compel the Department to ignore these and other recognition

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[32] Since obtaining recognition, the Department has used the provisions of the IRA to take several parcels of land in trust for the Grand Traverse Band. *Grand Traverse Band v. U.S.*, 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002) (noting that between 1988 and 1990, "[t]he United States took into trust multiple parcels of property" for the Band).

decisions, and instead, when deciding whether to take land into trust for an Indian tribe, rely on the hasty decisions made by Commissioner Collier in 1934. But agencies given the authority to make a particular decision are presumed to have the authority to correct that decision. *See, e.g., United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court can undo what is wrongfully done by virtue of its order"); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457-58 (1998) (concluding that an agency's decision to recalculate a base amount in a fixed reimbursement system, to prevent the distortion of future reimbursements, was reasonable).

Furthermore, this Court should not strain to give the IRA an interpretation that is clearly at odds with current congressional policy. *See Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (favorably quoting language from the Ninth Circuit's decision in *Santa Rosa Band of Indians v. Kings County*, which stated that courts "are not obligated in ambiguous circumstances to strain to implement . . . [a] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship"). In a recent amendment to the IRA itself, Congress confirmed that all federally recognized Indian tribes should be accorded the same treatment regardless of the time or manner of their recognition. Act of Nov. 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 476). Denying Indian tribes the benefits of the IRA – one of the most important

statutes affecting the federal-tribal relationship – would not be in accord with this policy.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

ROBERT T. ANDERSON
Associate Professor
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 685-2861

RICHARD A. GUEST
Staff Attorney
Counsel of Record
NATIVE AMERICAN
RIGHTS FUND
1712 N. St., NW
Washington, D.C. 20036
(202) 785-4166

COLETTE ROUTEL
Visiting Assistant Professor
UNIVERSITY OF MICHIGAN
SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109
(734) 763-6699

August 25, 2008

APPENDIX 1

List of congressional legislation recognizing Indian tribes*

1. Tonto Apache Tribe of Arizona (also called Payson Community of Yavapi-Apache Indians), P.L. 92-470 (Oct. 6, 1972)

2. Modoc Tribe of Oklahoma, P.L. 95-281 (May 15, 1978)

3. Pasqua Yaqui of Arizona, P.L. 95-375 (Sept. 18, 1978)

4. Maliseet Tribe of Maine (also called the Houlton Band of Maliseet Indians of Maine), P.L. 96-420 (Oct. 10, 1980)

5. Cedar City Band of Paiutes in Utah, P.L. 96-227 (Apr. 3, 1980)

6. Kickapoo Traditional Tribe of Texas, P.L. 97-429 (Jan. 8, 1983) (recognition as part of Kickapoo Tribe of Oklahoma; organized as a separate tribe on 7/11/89)

7. Mashantucket Pequot Indian Tribe of Connecticut, P.L. 98-134 (Oct. 18, 1983)

8. Ysleta Del Sur Pueblo of Texas, P.L. 100-89 (Aug. 18, 1987)

9. Lac Vieux Desert Band of Lake Superior Chippewa, P.L. 100-420 (Sept. 8, 1988)

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* This list does not include legislation restoring federal recognition to Indian tribes that, while recognized in 1934, were terminated by Congress in the 1950s and 1960s.

10. Yurok Tribe of California, P.L. 100-580 (Oct. 31, 1988)

11. Aroostook Band of Micmac Indians of Maine, P.L. 102-171 (Nov. 26, 1991)

12. Pokagon Band of Potawatomi Indians of Michigan, P.L. 103-323 (Sept. 21, 1994)

13. Little River Band of Ottawa Indians of Michigan, P.L. 103-324 (Sept. 21, 1994)

14. Little Traverse Bay Bands of Odawa Indians of Michigan, P.L. 103-324 (Sept. 21, 1994)

15. Central Council of the Tlingit & Haida Indian Tribes, Alaska, P.L. 103-454 (Nov. 2, 1994)

16. Loyal Shawnee Tribe of Oklahoma, P.L. 106-568 (Dec. 27, 2000)

APPENDIX 2

List of Indian tribes granted federal recognition through informal Executive Branch actions from 1960 to present

1. Miccosukee Tribe of Indians of Florida: Decision by an Assistant Secretary of the Interior (Nov. 17, 1961)

2. Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon: Department of the Interior Solicitor's opinion (Nov. 16, 1967)

3. Nooksack Indian Tribe of Washington: Department of the Interior Solicitor's opinion (Aug. 13, 1971)

4. Upper Skagit Indian Tribe of Washington: Decision by the Deputy Commissioner for Indian Affairs (June 9, 1972)

5. Sauk-Suiattle Indian Tribe of Washington: Decision by the Deputy Commissioner for Indian Affairs (June 9, 1972)

6. Passamaquoddy Indian Tribe of Maine: Administrative decision (June 29, 1972)

7. Penobscot Tribe of Maine: Administrative decision (July 14, 1972)

8. Sault Ste. Marie Tribe of Chippewa Indians of Michigan: Decision by the Deputy Commissioner for Indian Affairs/clarified by the Department of the Interior Solicitor's opinion (2/27/74) (Sept. 7, 1972)

9. Coushatta Tribe of Louisiana: Decision by the Assistant to the Secretary of the Interior (June 27, 1973)

10. Stillaguamish Tribe of Washington: Decision by the Assistant to the Secretary of the Interior responding to *Stillaguamish v. Klepp* (Oct. 27, 1976)

11. Karuk Tribe of California, Decision by the Assistant Secretary – Indian Affairs, January 15, 1979

12. Jamul Indian Village of California, Deputy Assistant Secretary – Indian Affairs designation as a half-blood community (July 7, 1981)

13. Ione Band of Miwok Indians of California, Decision by the Assistant Secretary – Indian Affairs, Mar. 22, 1994

14. King Salmon Tribe, Alaska, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

15. Shonnaq Tribe of Kodiak, Alaska, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

16. Lower Lake Rancheria, California, Decision by the Assistant Secretary – Indian Affairs, December 29, 2000

APPENDIX 3

Indian tribes granted federal recognition pursuant to 25 C.F.R. Part 83

1. Grand Traverse Band of Ottawa & Chippewa Indians, Michigan (May 27, 1980)

2. Jamestown S'Klallam Tribe, Washington (Feb. 10, 1981)

3. Tunica-Biloxi Indian Tribe, Louisiana (Sept. 25, 1981)

4. Death Valley Timbi-Sha Shoshone Band, California (Jan. 3, 1983)

5. Narragansett Indian Tribe, Rhode Island (April 11, 1983)

6. Poarch Band of Creek Indians, Alabama (Aug. 10, 1984)

7. Gay Head Wampanoag Indian Tribe, Massachusetts (April 11, 1987)

8. San Juan Southern Paiute Tribe, Arizona (March 28, 1990)
9. Mohegan Tribe, Connecticut (May 14, 1994)
10. Jena Band of Choctaw Indians, Louisiana (Aug. 29, 1995)
11. Huron Potawatomi, Inc., Michigan (Mar. 17, 1996)
12. Samish Indian Tribe, Washington (Apr. 26, 1996)
13. Match-e-be-nash-she-wish Band of Pottawatomie Indians, Michigan (Aug. 23, 1999)
14. Snoqualmie Tribe, Washington (Oct. 6, 1999)
15. Cowlitz Indian Tribe, Washington (Jan. 4, 2002)
16. Mashpee Wampanoag Tribe, Massachusetts (May 23, 2007)

APPENDIX 4

List of Indian tribes denied federal recognition pursuant to 25 C.F.R. Part 83

1. Lower Muskogee Creek Tribe-East of the Mississippi, Georgia (Dec. 21, 1981)
2. Creeks East of the Mississippi, Florida (Dec. 21, 1981)
3. Munsee-Thames River Delaware, Colorado (Jan. 3, 1983)
4. Principal Creek Indian Nation, Alabama (June 10, 1985)
5. Kaweah Indian Nation, California (June 10, 1985)

6. United Lumbee Nation of North Carolina and America, California (July 2, 1985)

7. Southeastern Cherokee Confederacy, Georgia (Nov. 25, 1985)

8. Northwest Cherokee Wolf Band, Oregon (Nov. 25, 1985)

9. Red Clay Inter-tribal Indian Band, Tennessee (Nov. 25, 1985)

10. Tchinouk Indians, Oregon (Mar. 17, 1986)

11. MaChis Lower Alabama Creek Indian Tribe, Alabama (Aug. 22, 1988)

12. Miami Nation of Indians of Indiana, Inc., Indiana (Aug. 17, 1992)

13. Ramapough Mountain Indians, Inc., New Jersey (Jan. 7, 1998)

14. MOWA Band of Choctaw, Alabama (Nov. 26, 1999)

15. Yuchi Tribal Organization, Oklahoma (Mar. 21, 2000)

16. Duwamish Indian Tribe, Washington (May 8, 2002)

17. Muwekma Ohlone Tribe of San Francisco Bay, California (Dec. 16, 2002)

18. Snohomish Tribe of Indians, Washington (Mar. 5, 2004)

19. Golden Hill Paugussett Tribe, Connecticut (Oct. 14, 2005)

20. Paucatuck Eastern Pequot Indians, Connecticut (Oct. 14, 2005)

21. Schaghticoke Tribal Nation, Connecticut (Oct. 14, 2005)

22. Burt Lake Band of Ottawa and Chippewa Indians, Inc., Michigan (Jan. 3, 2007)

23. St. Francis/Sokoki Band of Abenakis, Vermont (July 2, 2007)

24. Steilacoom Tribe of Indians, Washington (Mar. 19, 2008

AMICUS CURIAE BRIEF

101

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Petitioners,

v.

DIRK KEMPTHORNE,
SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NARRAGANSETT INDIAN TRIBE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

John F. Killoy, Jr., Esq.
SPECIAL COUNSEL
74 Main Street
Wakefield, RI 02879
(401) 783-6840

Thomas C. Goldstein
Counsel of Record
Patricia A. Millett
James T. Meggesto
Katherine E. Morgan
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

I. STATUTORY FRAMEWORK 2

II. FACTUAL BACKGROUND 4

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. THE SETTLEMENT ACT CONTAINS NO RESTRICTIONS ON THE SECRETARY'S DISCRETION TO PLACE LAND INTO TRUST FOR THE TRIBE 13

A. The Land "Claims" That The Settlement Act Resolved Do Not Include Applications To Take Land Into Trust 13

1. Only Legally Actionable "Claims" Under The Non-Intercourse Act or Aboriginal Title Were Extinguished 13

2. Congress's Extinguishment of Subsequently Arising Claims for Trespass Damages Did Not Repeal the IRA 19

B. The Terms Of The Settlement Act Reflect The Bargain That Was Struck 24

C. Congress Knows How To Limit Application Of The IRA And To Limit Indian Country Status When It Wants To, But It Did Not Enact Any Such Limitations In This Settlement Act 28

1. The Statutory Text Of Other Settlement Acts Confirms That The

Rhode Island Settlement Act Means Only What It Says And Does Not Repeal IRA Authority 28

2. Congress Borrowed ANCSA's Claims And Extinguishment Language But None Of The Other Aspects Of That Statute 31

3. Petitioners' Policy Arguments Are Based On An Inaccurate Interpretation Of Indian Country Jurisdiction And Greatly Overstate The Secretary's Discretion To Place Land Into Trust 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Alaska v. Native Village of Venetie Tribal Gov't,
522 U.S. 520 (1998) 26

Aleut Community of St. Paul Island v. United States,
480 F.2d 831 (Ct. Cl. 1973) 23

Auer v. Robbins,
519 U.S. 452 (1997) 19

BankAmerica Corp. v. United States,
462 U.S. 122 (1983) 26

Beck v. Prupis,
529 U.S. 495 (2000) 17

Blanchette v. Connecticut Gen. Ins. Corp.,
419 U.S. 102 (1974) 14

Branch v. Smith,
538 U.S. 254 (2003) 14

Bryan v. Itasca County,
426 U.S. 373 (1976) 27

Cass County v. Leech Lake Band of Chippewa Indians,
524 U.S. 103 (1998) 11

City of Sherrill v. Oneida Indian Nation,
544 U.S. 197 (2005) 11

County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 21

Keene Corp. v. United States,
508 U.S. 200 (1993) 28

Morton v. Mancari,
417 U.S. 535 (1974) 14

Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.,
89 F.3d 908 (1st Cir. 1996) 7

Narragansett Indian Tribe v. National Indian Gaming Comm'n,
158 F.3d 1335 (D.C. Cir. 1998). 4

Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.,
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414 U.S. 661 (1974) 5

S.E.C. v. Zandford,
535 U.S. 813 (2002) 19

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469 U.S. 310 (1985) 17

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442 U.S. 560 (1979) 28

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18 IBIA 67 (1989) 7

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35 IBIA 93 (2000) 7

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381 U.S. 1 (1965) 31

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1800 R.I. Acts & Resolves 101 5
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25 U.S.C. 1754(b)(8) 30
25 U.S.C. 1771d(c) 30
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25 U.S.C. 1771g 30
43 U.S.C. 1601(b) 32

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INTEREST OF *AMICUS CURIAE*

This case presents important questions concerning (i) the application of the Indian Reorganization Act to Indian tribes that were not formally acknowledged by the Government until after 1934, and (ii) whether the Rhode Island Indian Claims Settlement Act's (Settlement Act) extinguishment of the Tribe's pending and potential land "claims" precludes the Secretary of the Interior from exercising his discretion to accept land into trust for the Tribe. The Narragansett Indian Tribe (Tribe) has a vested interest in the Court's resolution of those questions. Indeed, the Settlement Act was enacted for the specific purpose of settling the Tribe's land claims against Rhode Island and other parties. The questions presented thus directly implicate the Tribe's interests under the Settlement Act, and its ability to exercise the rights preserved for it through the compromises and balancing that underlay the settlement. This Court's resolution of the questions presented thus will have a direct impact on the ability of the Tribe to maintain and exercise its sovereignty and cultural identity, as contemplated by the Act. [1]

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

STATEMENT

I. STATUTORY FRAMEWORK

1. Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, in 1934 to end the alienation of tribal land and to aid tribes in the acquisition of additional acreage. Section 465 of the IRA authorizes the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, * * * for the purpose of providing land for Indians." The IRA further provides that "[t]itle to any lands or rights acquired * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. 465. Rather than serving as a temporary measure, Congress envisioned the IRA to serve as a permanent force for tribes to have land placed in trust.

To initiate the trust land acquisition process, an individual Indian or tribe need only file a written request that "set[s] out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. 151.9. For on-reservation acquisitions, the Secretary must weigh (i) the existence of statutory authority for the acquisition and any limitations contained in such authority; (ii) the need of the individual Indian or the tribe for additional land; (iii) the purpose for which the land will be used; (iv) the impact on the State and its political subdivisions resulting from the removal

of the land from the tax rolls; and (v) jurisdictional problems and potential conflicts of land use which may arise. *Id.* § 151.10. For off-reservation acquisitions, the Secretary also considers the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation. *Id.* § 151.11.

2. The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. 1701 *et seq.*, was enacted to settle the Tribe's then-pending lawsuits against Rhode Island and various landowners alleging violations of the Indian Trade and Intercourse Act (Non-Intercourse Act), 25 U.S.C. 177. Federal legislation was necessary to render the conveyances consistent with the Non-Intercourse Act's requirement of congressional approval for such transactions involving Indian land. To resolve the Tribe's claims and "remove all clouds on titles * * * including lands not involved in the lawsuits," *Id.* § 1701, the Settlement Act ratified the earlier invalid transfers at issue in the lawsuit and any other transfers by or on behalf of the Tribe within the State, extinguished aboriginal title to those lands, and extinguished any claims based on those now-ratified transfers or on now-extinguished aboriginal title. *Id.* § 1705(a)(1)-(3).

In return, the Tribe received 1800 acres of "Settlement Lands," composed of 900 acres purchased with federal funds and 900 acres provided by the State, that were to be held by a State chartered corporation created by the Settlement Act. While the Settlement Act did not itself confer federal acknowledgment of the Tribe, the Act specifically contemplated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe

of Indians," and provided that, if it did, "then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary." 25 U.S.C. 1707(c).

Finally, the Settlement Act provided that the Settlement Lands would be subject to "the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. 1708. The Settlement Act was amended in 1980 to clarify that the Settlement Lands and any income produced from them were immune from federal, state and local taxation. 25 U.S.C. 1715. In 1996, Congress exempted the Settlement Lands from the Indian Gaming Regulatory Act. 25 U.S.C. 1708.

II. FACTUAL BACKGROUND

1. The Narragansett Indians are direct descendants of the original inhabitants of what is now Rhode Island. *See Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). From time immemorial, the Tribe has occupied aboriginal territory in Rhode Island, including the area around Charlestown, Rhode Island. Once one of the most powerful Indian tribes in all of New England, escalating hostilities and war with colonists left the Tribe decimated. As a result, in 1709, the Tribe ceded to the Colony all of the Tribe's territory, except for 64 square miles around Charlestown. William G. McLoughlin, *Rhode Island* 5 (1978). In 1880, Rhode Island's legislature authorized the "purchase from the Narragansett tribe of Indians [of] all their common tribal lands * * * for a

sum not exceeding five thousand dollars." 1800 R.I. Acts & Resolves 101.

The subsequent sale violated the Non-Intercourse Act, 25 U.S.C. 177, because it lacked the necessary federal approval. That same state law provided that "the tribal authority of the Narragansett tribe of Indians shall cease * * * and all persons who may be members of said tribe shall cease to be members thereof." R.I. Acts 1879-1880, c. 800. Although stripped of their land and officially "detribalized" by Rhode Island, the Narragansetts maintained their traditional tribal government. *See* Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983).

Following *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Tribe sued Rhode Island and individual landowners to recover 3200 acres of public and private land that were improperly alienated in 1880. *See Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 802 (D.R.I. 1976). Because the alienation of these lands violated the Non-Intercourse Act, the Tribe claimed that its title to those lands was superior to any title held by the State, its subdivisions, and private landowners. At the time of its lawsuits, the Tribe was not federally acknowledged, but had been incorporated since 1934 as a Rhode Island non-business corporation known as the Narragansett Tribe of Indians.

In 1978, the parties entered into a settlement the terms of which were memorialized in a Joint Memorandum of Understanding (Memorandum). J.A. 25a. The settlement provided the Tribe 900 acres of state-

owned land and federal funds to purchase an additional 900 acres of privately-owned land. *Id.* at 25a-26a. The Memorandum transferred those Settlement Lands to a corporation formed to "acquir[e], manag[e] and permanently hold[]" the lands for the descendants of those Narragansetts listed on the 1880 tribal roll. *Id.* at 25a. The Memorandum further provided that the Tribe had the same right as other Indian groups to petition for federal acknowledgment. *Id.* at 29a. In exchange, the Tribe agreed to dismiss with prejudice its pending claims, to release any other Non-Intercourse Act claims the Tribe may have had, and to extinguish its aboriginal title throughout the State. Congress subsequently passed the Settlement Act to implement the settlement. 25 U.S.C. 1701.

2. In 1983, the Secretary formally acknowledged the Narragansett Tribe as a federally recognized tribe. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). Federal "acknowledgement" or "recognition" does not create an Indian tribe. Instead, it reflects the federal government's formal acknowledgment that a particular Indian group is a bona fide Indian tribe that has exercised tribal governmental power and has been recognized as a distinct Indian community since at least first contact with Europeans. 25 C.F.R. 83.7. That acknowledgment rendered the Tribe "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes" and "entitled [it] to the privileges and immunities available to other federally recognized historic tribes by virtue of their government to government relationship with the United States." 25 C.F.R. 83.12(a). Two years later, Rhode Island transferred

the Settlement Lands to the Tribe, and the corporation was dissolved. R.I. Gen. Laws 37-18-12 to 18-14. The Tribe subsequently requested that the Settlement Lands be taken into trust by the federal government, as authorized by the IRA, 25 U.S.C. 465. The United States accepted the Settlement Lands in trust for the Tribe in September 1988.[2]

Of the 1800 acres of Settlement Lands, only 225 acres are suitable for development. *Town of Charlestown v. Eastern Area Director,* 35 IBIA 93, 95 (2000). The 900 acres provided by the State may only be used for conservation purposes, J.A. 28a, while several hundred other acres are sensitive wetlands or are cultural resource areas containing human remains. Admin. Record, Vol. II, Tab D, p. 4. The Tribe used the remaining acreage for its administrative, governmental, and community services buildings, which left very little land for tribal housing and community living. *See Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 911 (1st Cir. 1996).

Given the severe practical constraints of the remaining Settlement Lands and to provide the housing necessary for members to live together as a tribal community, the Tribe's housing authority purchased thirty-one acres of land adjacent to the Settlement Lands from a private developer in 1991. The Tribe then commenced construction on the first eighteen

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[2] The State lodged no objection to that transfer. The Town of Charlestown's administrative challenge to the decision was rejected. *Town of Charlestown v. Eastern Area Director,* 18 IBIA 67 (1989).

homes but Rhode Island and Charlestown filed suit to prevent the development as inconsistent with state and local law. *See Narragansett Electric Co.*, 89 F.3d at 910-11.[3]

3. In October 1993, the Tribe applied to the Secretary of the Interior to have the Housing Parcel taken into trust by the United States. Admin. Record Vol. I, Tab D. That application was renewed in July 1997, following the conclusion of the *Narragansett Electric* litigation. *Id.*, Vol II, Tab D. The renewed application explained that the housing development was essential to remedy the "lack of decent, safe, and affordable housing available to Narragansett Indian Tribal members." *Id.* at p. 5.

After specifically considering the objections raised by Rhode Island and Charlestown, the Area Director of the BIA approved the trust acquisition of the land "acquired for the express purpose of building much needed low-income Indian Housing via a contract between" the Tribe's housing authority and the U.S. Department of Housing and Urban Development. J.A. 46a. Rhode Island's and Charlestown's administrative appeal of the decision was denied. *Id.* at 71a.

Petitioners then filed suit under the Administrative Procedure Act against the Secretary of the Interior and the Area Director of the BIA, alleging that the trust acquisition was contrary to law. The dis-

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[3] While the Tribe planned to develop fifty units of elderly and low-income housing, local regulation requires that each homesite be at least two acres, which would limit the Tribe to fifteen housing units. 89 F.3d at 911.

trict court affirmed the BIA's decision. Pet. App. 84-136. The en banc First Circuit unanimously affirmed the Secretary's decision to take the land into trust. *Id.* at 1-81. The First Circuit held that Interior's interpretation of the IRA as permitting tribes acknowledged after 1934 to acquire land in trust was reasonable and entitled to deference under *Chevron U.S.A., Inc. v. NEDC*, 467 U.S. 837 (1984). *Id.* at. 17-37. The court further held that the decision to accept the application to acquire the land in trust was not arbitrary, capricious, or contrary to law. *Id.* at 59-71.

SUMMARY OF ARGUMENT

Petitioners' entire argument is an effort to obtain from this Court special benefits and limitations on tribal sovereignty that it did not obtain from the Narragansett Tribe in settlement negotiations or from Congress in implementing legislation. This Court's duty, however, is to implement the law as written and to respect congressional choices about what limitations to include – and which ones to omit – in legislation. If petitioners are dissatisfied with the bargain they struck, their proper recourse is to seek an amendment by Congress (which has twice already demonstrated its responsiveness to legitimate governmental concerns), rather than judicial interpolation of unwritten and unenacted legislative conditions.

Petitioners' attempt to proscribe the Secretary from taking land into trust for the Tribe runs headlong into the plain text of the Settlement Act, which imposes no restrictions of any kind on the Secretary's discretion to place land into trust. Nor does anything

in the text of the Settlement Act support the petitioners' central contention that the Settlement Act "explicitly" repealed the IRA in Rhode Island. Neither the statute nor its legislative history mentions the IRA, let alone repeals it, and this Court will not lightly imply an unwritten and unexpressed congressional intent to repeal a law, especially when, as here, the two statutes are fully capable of coexistence. What is more, the Settlement Act itself expressly contemplated that the Tribe could apply for and obtain the status of a federally recognized tribe. If Congress had intended to limit the Tribe's ordinary rights under the IRA upon obtaining such status, Congress logically would have appended such limitations to the statutory provision addressing tribal recognition. It did not and, given Congress's explicit contemplation that the Tribe could acquire the attributes of federal recognition, Congress's decision not to qualify that status must be given effect.

Petitioners' alternative argument – that the Settlement Act's extinguishment of any remaining Tribal "claims" to land forever foreclosed the Tribe from seeking to have land placed into trust by the Secretary – cannot survive a plain reading of the term "claim." By long-established usage, both elsewhere and within the Settlement Act itself, the term "claim" refers to assertions of an independent and pre-established *right* to land, not to requests for an agency's prospective exercise of statutory discretion. Indeed, the Congress that enacted the Settlement Act was well aware of the nature and extent of the many Eastern Indian Land "claims" pending in the federal courts in the 1970s and thus knew exactly the kind of "claim" it was settling. Congress accordingly made clear in the Settlement Act that the harm – the

"claims" – it sought to eliminate were those that clouded title to thousands of acres of land based on assertions of aboriginal title or violations of the Non-Intercourse Act. The Tribe's request to have the Housing Parcel placed in trust, pursuant to administrative and statutory law, thus is not a claim, but a request to the Secretary to exercise discretion to confer trust status on the Tribe's housing lands—which, if granted, reflects a normal attribute of federally recognized tribal status, rather than an assertion of aboriginal title or rights under the Non-Intercourse Act. And, contrary to petitioners' argument, nothing in the IRA or regulations predicate the decision to take land into trust on the existence of a tribal possessory right in the land. In fact, this Court itself has explained that the land-into-trust process is the preferred mechanism for Indian tribes to acquire land and assert sovereign control over it when Indian tribes *do not* have any unilateral possessory right to do so. *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Petitioners' argument thus turns both precedent and the ordinary meaning of statutory language on their head.

Similarly flawed is petitioners' isolated focus on the Settlement Act's claims-extinguishment language, which violates the cardinal rule that statutory language must be read in context. When the statute is read as a whole, relevant text reflects the Settlement Act's purpose to extinguish only existing claims of right based on aboriginal title or the Non-Intercourse Act, which is fully consistent with the continued operation of the IRA and the Secretary's

quite distinct discretionary authority under that statute to place land into trust.

Finally, petitioners' effort to judicially import unwritten restrictions into the Settlement Act collapses in the face of the statutory language Congress employed in other land claim settlement acts. In stark contrast to those other statutes, the Settlement Act omitted the limitations statutorily adopted in other laws and urged by the petitioners here. Of particular relevance, Congress left out of the Settlement Act the language restricting the IRA found in other settlement acts, and that omission must be respected. Indeed, the deliberateness with which Congress acted is underscored by the fact that Congress selectively picked and chose which language from the Alaska Native Claims Settlement Act it included in this Settlement Act (*i.e.*, the "claim" extinguishment language) and which language it did not (every other restriction). Congress, in other words, knows how to say it when it wants to restrict the land-into-trust process. And it did not say so here.

ARGUMENT

The central question in this case is whether legislation settling land "claims" under the Non-Intercourse Act should be read to extend beyond such possessory land "claims" to reach all prospective questions of land regulation by the Tribe within the State and, thereby, to divest the federal government of the authority to accord the Tribe the ordinary attributes and protections of tribal status. The plain text, design, and purpose of the Settlement Act foreclose that reading. If petitioners wish to revamp the

settlement that was legislatively struck in 1978 and return the Tribe to the functional equivalent of a State chartered Indian corporation, wholly subservient to the State in every meaningful way, the proper route for doing so is through Congress, not judicial amendment of statutory law.

I. THE SETTLEMENT ACT CONTAINS NO RESTRICTIONS ON THE SECRETARY'S DISCRETION TO PLACE LAND INTO TRUST FOR THE TRIBE

A. The Land "Claims" That The Settlement Act Resolved Do Not Include Applications To Take Land Into Trust

1. Only Legally Actionable "Claims" Under The Non-Intercourse Act or Aboriginal Title Were Extinguished

Petitioners' common refrain is that the Settlement Act "explicit[ly]" repealed the IRA in Rhode Island – and thus the Secretary's authority to take land into trust – because the Settlement Act extinguished all Indian "claims" within the State. Gov.'s Br. 35-42; State's Br. 38-57; Town's Br. 48-57. That argument confounds ordinary principles of statutory construction in three critical respects.

First, nothing in the text of the Settlement Act bears out petitioners' reading. When Congress wants one federal law to repeal application of another law it knows how to say so. But "[t]here is simply nothing in the text of the Settlement Act * * * that accomplishes such a repeal or curtailment of the Secretary's trust authority." Pet. App. 37. Neither the statute nor its legislative history mentions the IRA, let alone

repeals it. *See Preseault*, 494 U.S. at 12 (no repeal where other statute is not "mention[ed]"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (no repeal where the "interaction between" two statutes is never discussed); *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 136 (1974) (no repeal where federal law not considered or addressed in the legislation); *Morton v. Mancari*, 417 U.S. 535, 549 (1974)(no repeal where subsequent statute was silent as to IRA's Indian preference provisions).

That silence was no oversight. The Settlement Act expressly contemplated that the Tribe could apply for and obtain the status of a federally recognized tribe. 25 U.S.C. 1707(c). If Congress intended to limit the Tribe's rights under the IRA (or otherwise) upon obtaining such status, Congress logically would have said so there. It did not and, given Congress's explicit contemplation that the Tribe could acquire the attributes of federal recognition, Congress's decision not to qualify that status must be given effect.

Nor is there any basis for finding that the IRA was impliedly repealed. The starting point, of course, is that "repeals by implication are disfavored." *Blanchette*, 419 U.S. at 133. Accordingly, congressional intent to effect such a repeal must be "clear and manifest." *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) There is no such unambiguous indication here. Nor is there any "irreconcilable conflict" between the operation of the two statutes that could support implicit repeal. *Branch v. Smith*, 538 U.S. 254, 273 (2003). The Settlement Act resolved a particular species of tribal land claims – those asserting violations of the Non-Intercourse Act – in order to remove the sub-

stantial clouds on title on both the land within the area claimed by the Tribe in the lawsuit and any land that might be subject to future claims that the Non-Intercourse Act was violated by prior acquisitions of tribal land. *See* 25 U.S.C. 1701(b) ("[T]he pendency of these lawsuits has resulted in severe economic hardships * * * by clouding the titles to much of the land in the town, *including lands not involved in the lawsuits*.") (emphasis added). The IRA, by contrast, governs one of the ordinary attributes of federal recognition of an Indian tribe by providing a mechanism for the establishment or enhancement of a tribal land base. Those two schemes are fully "capable of coexistence," as evidenced by the Secretary's decision to take the Settlement Lands themselves into trust. Accordingly, it is "the duty of the courts * * * to regard each as effective." *Blanchette*, 419 U.S. at 133-34.

Second, the Settlement Act extinguished only actionable "claims" to land, such as those based on the Non-Intercourse Act or aboriginal title. 25 U.S.C. 1705. The term "claim," however, cannot naturally be read to encompass either the Tribe's application for an exercise of Executive Branch discretion to take land into trust, or the Secretary's discretionary judgment to grant or deny such a request. The word "claim" means not an application for favorable discretionary action, but "[a] demand for money, property, or a legal remedy to which one asserts a right." Black's Law Dictionary 264 (8th ed. 2004); *see also* Webster's New International Dictionary 493 (2d ed. 1959) ("a title to any debt, privilege, or other thing in possession of another; also, a title to anything which another should give or concede to, or confer on, the claimant").

That is also how Congress used the term "claim" in the Settlement Act itself. For example, Section 1705 refers to demands for money or property to which the Tribe asserted a right based on aboriginal title or the invalidity of nineteenth century land transfers that violated the Non-intercourse Act. *See infra* at Section I, Part 2. Indeed, by the late 1970s "land claims" litigation had been filed in several of the original thirteen colonies, including Rhode Island, based on prior Indian land cessions negotiated by those States in violation of the Non-Intercourse Act. *See* Clinton and Hotopp, *supra Judicial Enforcement of the Federal Restraints on Alienation of Indian Lands: The Origins of the Eastern Land Claims*, at 78 (noting the progression of cases filed by the Oneida, Passamaquoddy, Penobscot, Mashpee, and Narragansett Tribes). In those cases, as here, "[t]he most immediate problem in all of the claims [wa]s the cloud on property title resulting from pending or potential litigation." Reynold Nebel, Jr. Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 Am. U.L. Rev. 695, 699, 727 (1978) ("Real estate markets in affected areas have been paralyzed as a result of the tribes' lawsuits. Most title insurance companies refuse to insure property titles in these areas, viewing the claims as a 'cloud on title' sufficient to withhold the necessary certification of marketability of title."); *see also* Clinton, *supra*, at 89 (same). Thus, those are the land "claims" that the Settlement Act resolved and extinguished. Nothing in the ordinary meaning of the term "claim" or the problem to which the legis-

lation responded supports petitioners' effort to extend the Act to proscribe prospective tribal requests for discretionary Executive Branch protection.[4] And "it is not up to [courts], in construing the scope of this [statute], to identify a problem that did not trouble Congress, or to attempt to correct it." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 322 (1985).

Accordingly, the Congress that enacted the Settlement Act was well aware of the nature and extent of Eastern Indian Land claims and thus knew exactly the kind of "claim" it was settling. *Cf. Beck v. Prupis*, 529 U.S. 495, 500-01 (2000) (when Congress uses a word or phrase with a settled meaning at common law, it is presumed to know and adopt that meaning unless the statute indicates otherwise); *Neder v. United States*, 527 U.S. 1, 21 (1999). Congress thus made clear in the Settlement Act that the harm it

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[4] Congress has long used the term "claims" in statutes to refer to the illegal taking of Indian land. For instance, the Indian Claims Commission Act provides that:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant * * *.

60 Stat. 1049, 25 U.S.C. 70a (1976 ed.)

sought to eliminate was the clouding of land titles to thousands of acres of land. 25 U.S.C. 1701(b).

Third, contrary to petitioners' argument, an application to have land taken into trust does not rest upon or require an assertion of a possessory right to the land or unextinguished aboriginal title. Gov.'s Br. 39-40; State's Br. 41; Town's Br. 43-44. Neither the IRA nor the Secretary's IRA implementing regulations require a tribe to demonstrate unextinguished aboriginal title or an actionable possessory land claim in its trust application. The Secretary has identified by formal regulation the criteria to be considered in taking land into trust, and a supervening claim of aboriginal right or possessory tribal right is not one of them. 25 C.F.R. 151.10.[5] Rather, the request need only identify the parties, describe the land, and set out other qualifying information. 25 C.F.R. 151.9. *See supra* A.1 (listing the qualifying criteria). In fact, the regulations expressly disprove petitioners' reading because they permit the Secretary to place land into trust either "[w]hen the tribe already owns an interest in the land; *or* * * * [w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or *Indian housing*." 25 C.F.R. 151.3 (emphasis added).

This Court too has explained that the Secretary's taking of land into trust is the preferred mechanism

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[5] The regulations carefully balance state, local and tribal interests and "are sensitive to the complex jurisdictional concerns that arise when a tribe seeks to regarding sovereign control over territory." *City of Sherrill*, 544 U.S. at 220.

for Indian tribes to acquire land and assert sovereign control over it when they lack the unilateral ability to gain possessory rights (such as through an action at law) or to assert sovereignty over the land. Indeed, in *Cass County*, 524 U.S. at 115, this Court held that, even after Congress formally disestablished a tribe's reservation, the IRA was still available to that Tribe to repurchase the land on the open market and render it immune from state and location taxation. *Id.* at 115 ("In § 465 * * * Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt."); *see also City of Sherrill*, 544 U.S. at 221 (IRA was the "proper avenue" for the Oneida Nation to re-establish sovereign authority over land which it last held over two hundred years ago).

In sum, the Secretary's decision to take the land into trust properly weighed the relevant criteria and was not predicated on a finding that the Tribe had aboriginal title or another form of possessory right. That determination, reflected both in the formal regulations and the administrative decision in this case, merits substantial deference. *See S.E.C. v. Zandford*, 535 U.S. 813, 819-20 (2002)(agency's interpretation of a statute in formal administrative proceeding merits deference); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency position first articulated in litigation).

2. *Congress's Extinguishment of Subsequently Arising Claims for Trespass Damages Did Not Repeal the IRA*

Petitioners' contention that the Settlement Act repealed the IRA's provision for taking land into

trust rests centrally on the language of 25 U.S.C. 1705(a)(3), which provides:

> by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof * * * by the Indian Corporation or * * * the Narragansett Tribe of Indians * * * arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

Petitioners assert that 1705(a)(3) extinguished all land-related *claims* arising "subsequent to" the ratified transfers, and prospectively extinguishes any *claims* the Tribe might make on the basis of its Indian status or its aboriginal occupancy of land, including any current *claim* to territorial sovereignty in Rhode Island. Gov.'s Br. 40-41; State's Br. 45-49; Town's Br. 54-56. Their reliance on that language in isolation, however, "violat[es] the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006). When read, as it should be, in conjunction with the preceding sections that specifically define the "approval[s] of a transfer of land" and "extinguishment of aboriginal title" "by virtue of" which subsequent "claims" are extinguished, the statutory text is fully consistent with preserving the IRA and the Secretary's quite distinct discretionary authority under that statute to place land into trust.

Section 1705(a)(1) identifies the approved transfers of land as those that had previously occurred in violation of the Non-Intercourse Act and through which the Tribe had been divested of its aboriginal homeland. Congress "hereby approved" "any transfer of land * * * by, from, or on behalf of * * * the Narragansett Tribe" and "deemed [it] to have been made in accordance with the Constitution and all laws of the United States." 25 U.S.C. 1705(a)(1). "Extinguishment of the Indian claims," both the House and Senate Committees explained, "is accomplished by approving for purposes of this legislation *prior* conveyances of land from the tribe to non-Indians effective as of the date of such transfers." S. Rep. No. 95-972, at 12 (1978) (emphasis added); H.R. Rep. No. 95-1453, at 10 (1978) (emphases added); *see* H.R. Rep. No. 95-1453, at 15 (1978) (the Act "is intended to resolve once and for all the claims *being asserted* by the Narragansett Indians to lands * * * on the ground that *past* transfers of those lands may have been made in violation of the Indian Nonintercourse Act") (emphasis added). In practical terms, the Tribe and Rhode Island had negotiated a settlement, but they needed congressional action to remove the legal predicate for the Tribe's superior title by "deem[ing]" what had been an unlawful transfer to now be "in accordance with" the law. 25 U.S.C. 1705(a)(1); *see County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Section 1705(a)(2) similarly identifies the land for which aboriginal title was extinguished as the land involved in previous transfers for which the Tribe had claimed or could, in the future, claim a violation of the Non-Intercourse Act. Indeed, the statutory text expressly cross-references the same land for

which transfer was approved in the preceding Section, providing that, "to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land * * * to which * * * the Narragansett Tribe * * * had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title *as of the date of said transfer*." 25 U.S.C. 1705(a)(2) (emphasis added).

The Settlement Act's legislative history confirms what the statutory text indicates. Congress limited subsections (a)(1) and (a)(2) to prior transfers because of the Administration's concern that the ratification and extinguishment language be unmistakably retroactive. The Administration offered a substitute bill with language ensuring that, "under the just compensation clause of the 5th amendment, the potential liability for extinguishment by the United States would be measured by the value of the claim as of the prior conveyance (1790–1880) rather than present day values." S. Rep. No. 95-972, at 10 (1978); *see also* H.R. Rep. No. 95-1453, at 11 (1978) (same). "This is an important point," explained the Solicitor of the Department of the Interior, "since with the extinguishment language we need to provide as much assurance as possible to the United States that the bill—or any future bill modeled on this one—will not form the basis for a claim of a taking as of the date of enactment." H.R. Rep. No. 95-1453, at 15 (1978). The use of explicitly retroactive language thus was deliberately designed to effect "both extinguishment and ratification as of the date of the original transfers." S. Rep. No. 95-972, at 16 (1978); *see also* H.R. Rep. No. 95-1453, at 15 (1978) (same). The enacted text is identical to the Administration's proposed lan-

guage – language that was purposefully designed to accomplish the purely retroactive extinguishment of all Non-Intercourse claims that had been or could have been asserted. *Compare* Pub. L. No. 95-395, § 6, 92 Stat. at 815, *with* S. Rep. No. 95-972, at 18–24 (1978) (presenting the Administration's substitute bill), *and* H.R. Rep. No. 95-1453 18–23 (1978) (same).

Thus, with Section 1705(a)(3)'s reference to claims "arising subsequent to the transfer," Congress captured any claims that might have remained, both (i) claims for trespass against third parties arising from occupation of land held under aboriginal title after it was invalidly transferred, and (ii) claims against the United States for authorizing such transfer in violation of its fiduciary duties to the Tribe. Indeed, in crafting Section 1705(a)(3), the House Report explained that the Section was introduced "to avoid the legal problems with respect to assertion of trespass claims which have arisen under [the Alaska Native Claims Settlement Act (ANCSA)]." S. Rep. No. 95-972, at 12 (1978); *see also* S. Rep. No. 95-972, at 6, 12 (1978). "While it might ordinarily be assumed," the Solicitor of the Department of Interior explained, "that extinguishment and ratification as of the date of the original transfers would necessarily preclude assertion of trespass claims, recent court decisions involving [ANCSA] suggest that it is important for Congress to use the most explicit language possible when it deals with Indian claims." *Id.* at 16. Beyond that, the text reflects that the Administration also had reason to worry about claims arising from the illegality of the original transfers based on forms of title other than aboriginal title. *See Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 833, 838 (Ct. Cl. 1973) (recognizing potential

right to compensation based on fee title acquired under the law of Czarist Russia, and explaining that ANCSA had not extinguished claims for breach of the government's obligation to deal fairly and honorably with the Aleuts).

Accordingly, when read as an integrated whole (as courts must do), Section 1705(a)(3)'s reference to the extinguishment of "subsequent" claims "by virtue of" Sections 1705(a)(1) and (a)(2) pertains only to legally actionable claims, such as those arising out of the prior Non-Intercourse Act or aboriginal title violations, and does not reach forward to divest either the Secretary of his statutorily conferred discretion or the Tribe of the ordinary attributes of tribal status with respect to land newly acquired following the Settlement Act. The aim, instead, was to extinguish any rights "based upon any interest in or right involving" the transferred land, 25 U.S.C. 1705(a)(3), or "an extinguishment of aboriginal title effected thereby," *Id.*, regardless of whether those rights had already been asserted or instead were asserted "subsequent to" Congress's approval of the prior land transfers.

B. The Terms Of The Settlement Act Reflect The Bargain That Was Struck

Petitioners insist that the Settlement Act flatly precludes the Secretary from placing *any Rhode Island land* into trust for an Indian tribe on the theory that they did not bargain for "mere temporary extinguishment of aboriginal title and Indian country in the State." State's Br. 38-39. That is wrong on multiple levels.

First, that argument simply begs the question of what lands were bargained over. The Settlement Act resolved a specific dispute between the Tribe, the State and various landowners. The acquisition of trust land outside the Settlement Lands is a distinct and separate acquisition that has no connection to the "claims" the Settlement Act resolved. With respect to the lands subject to the "claims" that the Settlement Act settled, there is no question that petitioners obtained the very permanent extinguishment for which they bargained. But with respect to the acquisition of future land – land not subject to any "claim" of possessory right – and the Tribe's exercise of the ordinary attributes of federal recognition, the statute was noticeably silent. It expressly contemplated the prospect of federal recognition (which includes the acquisition of additional trust lands) – but then, having flagged that prospect, the statute left all the normal attributes that flow from recognition unaddressed. Petitioners' effort to shoehorn express limitations on tribal rights with respect to one category of land into a wholly distinct category is an effort to amend, not enforce, the original bargain simply because petitioners failed to anticipate the consequences of the federal recognition that the Settlement Act expressly contemplated as a possibility.

Second, petitioners' argument fails to come to grips with the fact that the Secretary took the Settlement Lands themselves into trust – and did so without any objection from the State. *See Narragansett Elec. Co.*, 89 F.3d at 913. The only difference is that, pursuant to the express terms of the Settlement Act, the Settlement Lands remain "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," notwithstanding their trust status.

25 U.S.C. 1708(a). As an initial matter, that proves that the Settlement Act did not repeal the IRA in Rhode Island. More importantly, the Secretary's near contemporaneous construction of the Settlement Act as consistent with the IRA's trust provision is entitled to significant deference. *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (giving "great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement").

Petitioners' argument that "[s]overeign Indian territory has never existed in the State of Rhode Island" fares no better. Gov.'s Br. 47. When the federal government took the Settlement Lands into trust on behalf of the Tribe, those lands were, by their very nature, set aside for the Tribe and thus constitute Indian country. *See* 18 U.S.C. 1151(a); *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (Congress meant to include within "Indian country" any lands that "have been set aside by the Federal Government for the use of the Indians as Indian land" and are "under federal superintendence."). The Settlement Act thus did not strike a bargain that there would never be any Indian country in Rhode Island.

Nor is there anything anomalous about allowing the Secretary to take non-settlement lands into trust. Petitioners protest that "the Tribe would be free to exercise territorial sovereignty over land *anywhere* in the State, *except* on the Settlement Lands—which are the heart of the Tribe's ancestral home." Gov's Br. 44-45; *see also* State's Br. 19. That argument forgets that the Tribe also exercises territorial sovereignty over the Settlement Lands. The Settlement Act

merely extended concurrent state jurisdiction onto the Settlement Lands, it did not displace tribal jurisdiction. *See Narragansett Elec. Co.*, 89 F.3d at 913 ("the Tribe * * * has 'concurrent jurisdiction over, and exercise[s] governmental power with respect to [the Settlement Lands].'").

What petitioners object to is not the exercise of tribal jurisdiction, but the displacement of state jurisdiction. But that is commonplace in every State that is home to federally recognized Indian tribes. Nor is it an anomaly that the State would lack jurisdiction over the Housing Parcel. Petitioners again fail to recognize a key point—that the Settlement Act and the Housing Parcel involve two distinct parcels of land at two different periods of time and with tribal authority grounded on two very different bases. As such, the State's jurisdiction over the Settlement Lands—which was reached through negotiation—does not extend to the Housing Parcel because the right to exclusive tribal sovereignty arises from the Tribe's unrestricted federal acknowledgment subsequent to the Settlement Act.

In effect, the petitioners are attempting to obtain from this Court the same concurrent jurisdictional status accorded to other States under Public Law 280, Pub. L. No. 83-280, 67 stat. 588 (1953), *codified as amended at* 18 U.S.C. 1162 and 28 U.S.C. 1360. *See Bryan v. Itasca County*, 426 U.S. 373, 379-83 (1976) (acknowledging the predominant purposes of Public Law 280 were to provide reservation Indians with access to state courts and to authorize the application of state law to disputes arising in Indian country). The short answer to that argument, however, is that the Settlement Act neither cross-references that

law nor incorporates its language, and this Court is not free to write it in for petitioners. "[T]he proper theater for such arguments * * * is the halls of Congress." *Keene Corp. v. United States*, 508 U.S. 200, 217 (1993) (internal quotation marks omitted). "[I]t is not for [courts] to fill any *hiatus* Congress has left in this area." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) (internal quotation marks omitted). *See also* Pet. App. 9-10 (Although "the State apparently failed to anticipate this particular problem at the time of the settlement, * * * [w]e are not free to reform the Act. If aggrieved, the State must turn to Congress.").[6]

C. Congress Knows How To Limit Application Of The IRA And To Limit Indian Country Status When It Wants To, But It Did Not Enact Any Such Limitations In This Settlement Act

1. *The Statutory Text Of Other Settlement Acts Confirms That The Rhode Island Settlement Act Means Only What It Says And Does Not Repeal IRA Authority*

The Settlement Act at issue in this case is just one of numerous settlement acts passed by Congress.

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[6] Congress has amended the Settlement Act twice already to deal with issues that were not covered by the statutory text. First, Congress clarified that the Settlement Land "shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation." 25 U.S.C. 1715(a). Second, Congress amended the Settlement Act to prohibit the Tribe from gaming on the Settlement Lands. *See* 25 U.S.C. 1708(b).

Each of those Acts is the unique product of the particular problems and compromises that gave rise to each of those separate Acts. Those other Acts are of particular relevance here, however, because they demonstrate that, when Congress intends to withdraw the Secretary's authority to place land into trust, it knows how to say so and it says so directly. The absence of similar language here forecloses petitioners' effort to have an extratextual limitation judicially interpolated.

In the Maine Indian Claims Settlement Act, Congress explicitly provided that land the Secretary acquires within an eligible area for the tribes in question shall be held in trust, while land outside that area is to be held in fee by the tribe or nation. "Except for the provisions of this subchapter, the United States shall have no authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. 1724(e) (1980). The Settlement Act at issue here contains no comparable language.

The Connecticut Indian Claims Settlement Act draws an explicit distinction between "lands or natural resources . . . within the settlement lands" purchased with settlement funds to be held in trust by the United States, and those lands outside the settlement lands purchased with settlement funds to be held only in fee by the Tribe. 25 U.S.C. 1754(b)(7). For those lands held in fee by the tribe, the United States has no further trust responsibility and Congress mandated that the land "shall not be subject to any restriction against alienation under the laws of

the United States." *Id.* § 1754(b)(8). Again, the Settlement Act at issue here contains no such language.

For its part, the Massachusetts Indian Land Claims Settlement Act specifically limits subsequent tribal acquisitions to those areas "contiguous to the private settlement lands." 25 U.S.C. 1771d(c). In contrast to petitioners' attempt to impute atextual limitations on the ordinary attributes of tribal sovereignty, the Massachusetts Act made clear that "any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, an jurisdiction of the Commonwealth of Massachusetts." 25 U.S.C. 1771g. The Settlement Act at issue here lacks any such textual counterpart.[7]

Against that backdrop, petitioners' contention that their bargain silently included similar, yet unwritten, restrictions rings hollow. If the Settlement Act contained such restrictions, they would have been reflected in the same language Congress employed in the settlement acts of petitioners' neighboring States of Maine, Connecticut, and Massachusetts. Petitioners, moreover, have never made any effort to have the

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[7] Also unlike the Settlement Act here, which only provides that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," 25 U.S.C. 1708(a), the Massachusetts Act goes further, directing that the Wampanoag Tribe "shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable federal laws." *id.* § 1771e(a).

Settlement Act amended either to withdraw the Secretary's established statutory power to place land into trust or to deny the Tribe the established attributes of tribal sovereignty. That omission is particularly telling because Congress has revisited the Settlement Act twice already for purposes of amendment, 25 U.S.C. 1708 & 1715, and the second amendment postdated both the Secretary's decision to take the Settlement Lands into trust and the Tribe's application for similar trust status for the Housing Parcel. Had Congress shared petitioners' view that the Secretary's action unraveled the bargain underlying the Settlement Act, that would have been the logical time for Congress to react. That Congress did the opposite and left the Secretary's action "untouched" thus legislatively ratifies the Secretary's position that its authority under the IRA remains intact, *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965), and there is no reason for this Court to give petitioners what Congress has withheld.

2. Congress Borrowed ANCSA's Claims And Extinguishment Language But None Of The Other Aspects Of That Statute

Petitioners contend that the Settlement Act was modeled on the Alaska Native Claims Settlement Act (ANCSA) and that, accordingly, this Court should overlay the Settlement Act with ANCSA's comprehensive scheme governing the relations between the State of Alaska and hundreds of Native villages. Gov.'s Br. 45-47; State's Br. 43-44; Town's Br. 57, n. 19. The problem for petitioners is that the language of extinguishment in ANCSA is wholly absent from the Settlement Act, and those language differences disprove, rather than support, petitioners' argument.

First, ANCSA expressly ended the reservation system in all of Alaska (with the narrow exception of the Metlakatla Indian Reservation). 43 U.S.C. 1601(b) (settling the claims "without creating a reservation system"). That stands in sharp contrast to the Settlement Act, which restored to the Tribe a portion of its historical land base which, when taken into trust by the Secretary in 1988, became the Tribe's reservation and Indian country.

Second, ANCSA provided no federal superintendence over Native corporation lands, which are at all times freely alienable. 43 U.S.C. 1601(b)(settling the claims "without creating * * * wardship or trusteeship"). The Settlement Act, in contrast, said nothing about foreclosing federal superintendence and, in fact, the Settlement Lands became subject to the federal restrictions against alienation *pursuant to the Settlement Act* upon the Tribe's federal acknowledgement in 1983. 25 U.S.C. 1707(c) (emphasis added).

Third, ANCSA established perpetual Native shareholder-controlled corporations and provided for the eventual alienability of ANCSA corporate stock. By comparison, the Settlement Act expressly anticipated that the Secretary could "subsequently acknowledge[] the existence of the Narragansett Tribe of Indians," 25 U.S.C. 1707(c) (which dissolved the corporation) and thus textually preserved the well-established predicate for trusteeship under the IRA.

Relying on a 1993 opinion of the Interior Department's Solicitor, petitioners' insist (Gov.'s Br. 45) that ANCSA repealed the trust provisions of IRA in Alaska. Even were that a correct view of ANCSA, it

would avail petitioners nothing given the substantial differences between ANCSA and the Settlement Act.

But their view of ANCSA is not correct. That 1993 Solicitor opinion rested on a 1978 Solicitor opinion, which stated that the intent and purpose of ANCSA was to prohibit trust acquisitions by the Secretary. That view, however, has long since been rescinded. In January 2001, the Department officially withdrew the 1978 Opinion, and the Department's official position is that "ANCSA did not expressly repeal the 1936 IRA provision authorizing the Secretary to take Alaska land in trust." Defendants' Mem. in Support of Cross-Motion for S. J'ment at 8, *Akiachak Native Cmty. v. Dep't of the Interior*, No. 1:06-cv-00969 (D.D.C. June 13, 2008). That means that the very foundation for the memorandum on which petitioners rely has crumbled. At a minimum, that memorandum would be a thin reed on which to hang an entirely atextual, judicial homogenization of the very differently written ANCSA and Settlement Act.

3. Petitioners' Policy Arguments Are Based On An Inaccurate Interpretation Of Indian Country Jurisdiction And Greatly Overstate The Secretary's Discretion To Place Land Into Trust

Confounded at every turn by the statutory text, petitioners advance two main policy reasons why, in their view, this Court should rewrite the Settlement Act. Neither is persuasive and, in any event, their arguments are aimed at the wrong audience.

First, the Governor claims (Gov.'s Br. 44) that "creating enclaves of Indian country within the densely populated State would create significant ad-

ministrative problems for the State and greatly complicate efforts to enforce its laws within its territorial boundaries." But that does not make Rhode Island different from any of the numerous other States that, because of the presence of Indian lands, function with mixed jurisdictional sovereignty. Indeed, this Court has often recognized that "checkerboard jurisdiction is not novel in Indian law." *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979). The State insists (States Br. 56) that it should be treated differently because it is a small state. But Rhode Island has been small for more than two hundred years – a fact of which Congress presumably was aware when it passed the Settlement Act.

Second, the State expresses fear (State's Br. 57) that the Secretary could "take hundreds or thousands of additional acres of land into trust in the future." Perhaps. But, like all such slippery-slope arguments, the State's contention baselessly presumes the agency's wholesale abandonment of the careful balancing of interests required by the Secretary's own regulations and a willful imperviousness to the interests and needs of Rhode Island's citizens, not to mention the substantial political checks such extraordinary action would trigger. Tellingly, reality has proven otherwise. Speculation unhinged from reality provides no excuse for this Court to preempt Congress's legislative role.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

John F. Killoy, Jr., Esq.
Special Counsel
74 Main Street
Wakefield, RI 02879
(401) 783-6840

Thomas C. Goldstein
Counsel of Record
Patricia A. Millett
James T. Meggesto
Katherine E. Morgan
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

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DONALD L. CARCIERI,
GOVERNOR OF RHODE ISLAND, *ET AL.*,
Petitioners,

v.

DIRK KEMPTHORNE,
SECRETARY OF THE INTERIOR, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Washington, DC 20005
(202) 466-7767

IAN HEATH GERSHENGORN
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

RIYAZ A. KANJI
KANJI & KATZEN, PLLC
101 North Main Street
Suite 555
Ann Arbor, MI 48104
(734) 769-5400

PHILIP P. FRICKEY
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
892 Simon Hall
Berkeley, CA 94720
(510) 643-4180

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE INDIAN LAND CONSOLIDATION ACT GIVES THE SECRETARY AUTHORITY UNDER SECTION 465 TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE 6

II. THE SECRETARY HAS STATUTORY AUTHORITY UNDER THE IRA TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE 9

A. The IRA Leaves Ample Room for the Secretary's Reasonable Interpretation. 11

1. The Definition of "Indian" Is Not Exhaustive. 12

2. Congress Did Not Unambiguously Require "Now" to Mean "At the Time of Enactment." 14

3. Section 465 Provides the Secretary with Broad Authority to Take Land in Trust for an "Indian Tribe." 21

B. Subsequent Legislation Confirms the Secretary's Statutory Authority Here. 23

1. The State's Reading Is at Odds with the Body of Federal Indian Legislation. 24

2. Congress Has Enacted Legislation That Presumes the Secretary's Reading of the IRA Is Correct.....27

C. Nothing in the 1936 Department Circular Compels a Different Result. 29

D. The IRA Was Not Targeted Narrowly at the Victims of Allotment. 30

III. THE INVALIDATION OF THE SECRETARY'S REGULATIONS WOULD BE DEVASTATING FOR NEWLY ACKNOWLEDGED TRIBES. 32

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78 (1918) 11

American Surety Co. of New York v. Marotta, 287 U.S. 513 (1933) 13

Barnhart v. Thomas, 540 U.S. 20 (2003) 8

Board of Commissioners v. Seber, 318 U.S. 705 (1943) 10

Bryan v. Itasca County, 426 U.S. 373 (1976) 11

Burgess v. United States, 128 S. Ct. 1572 (2008) 12, 13

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2, 10

Choate v. Trapp, 224 U.S. 665 (1912) 11

City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D.D.C. 1980) 21

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 11

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 11

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) 22

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 23

TABLE OF AUTHORITIES - continued

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941) 13

General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004) 10, 15

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) 18

Groman v. Commissioner, 302 U.S. 82 (1937) 12, 13

Jones v. United States, 527 U.S. 373 (1999) 6

Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50 (2004) 4

Loving v. United States, 517 U.S. 748 (1996) 28

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 31

Morton v. Mancari, 417 U.S. 535 (1974) 10, 31

Narragansett Indian Tribe v. National Indian Gaming Commission, 158 F.3d 1335 (D.C. Cir. 1998) 31

National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) 23

NationsBank of North Carolina, N.A., v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995) 28

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 10

TABLE OF AUTHORITIES - continued

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 28

Republic of Philippines v. Pimentel, 128 S. Ct. 2180 (2008) 13

Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) 20

Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 28

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 29, 30

United States v. Candelaria, 271 U.S. 432 (1926) 21

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) 15

United States v. Estate of Romani, 523 U.S. 517 (1998) 24

United States v. Granderson, 511 U.S. 39 (1994) 18

United States v. John, 437 U.S. 634 (1978) 30

United States v. New York Telephone Co., 434 U.S. 159 (1977) 12, 13

United States v. Reily, 290 U.S. 33 (1933) 14

United States v. Sandoval, 231 U.S. 28 (1913) 21

TABLE OF AUTHORITIES - continued

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 23

Young v. Community Nutrition Institute, 476 U.S. 974 (1986) 28

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Const. art. II, § 2, cls. 1-2 10

25 U.S.C. § 2 10

25 U.S.C. § 9 10

25 U.S.C. § 331 17

25 U.S.C. § 461 ..... 17, 32

25 U.S.C. § 462 32

25 U.S.C. § 463 32

25 U.S.C. § 465 ..... 15, 16, 22, 32

25 U.S.C. § 469 32

25 U.S.C. § 470 32

25 U.S.C. § 472 ..... 15, 16

25 U.S.C. § 476 32

25 U.S.C. § 476(f) 24

25 U.S.C. § 476(g) 24, 25

25 U.S.C. § 477 32

25 U.S.C. § 478 ..... 7, 26, 32

25 U.S.C. § 478-1 26

25 U.S.C. § 479 ..... 2, 3, 12, 13, 16

25 U.S.C. § 479a 25

TABLE OF AUTHORITIES - continued

25 U.S.C. § 479a-1 25

25 U.S.C. § 1747(a) 33

25 U.S.C. § 1771d 33

25 U.S.C. § 1775c(a) 33

25 U.S.C. § 2201(1) 7

25 U.S.C. § 2202 ..... 7, 8

25 U.S.C. § 2203(a) 8

25 U.S.C. § 2204(a) 8

25 U.S.C. §§ 2701, *et seq.* 27

25 U.S.C. § 2719(a) 27

25 U.S.C. § 2719(b)(1)(B)(ii) 27

28 U.S.C. § 2409a(a) 35

Federally Recognized Indian Tribe List Act of 1994,Pub. L. No. 103-454, 108 Stat. 4791 ..... 25, 26

Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983) 4, 26

Pub. L. No. 106-423 33

25 C.F.R. § 5.1(a) 9

25 C.F.R. § 20.100 26

25 C.F.R. § 23.2 26

25 C.F.R. § 36.3 26

25 C.F.R. § 39.2 26

25 C.F.R. § 81.1(b) 9

TABLE OF AUTHORITIES - continued

25 C.F.R. § 83.7(b) 20
25 C.F.R. § 83.7(c) 20
25 C.F.R. § 83.7(e) 20
25 C.F.R. § 151.2(b) 9
25 C.F.R. § 151.2(c)(1) 9
25 C.F.R. § 162.101 26
25 C.F.R. § 163.1 9
25 C.F.R. § 166.4 27
25 C.F.R. § 211.3 27
42 C.F.R. § 136.41(a) 9

LEGISLATIVE MATERIAL

140 Cong. Rec. 11235 (1994) 25
H. Rep. 97-908 (Sept. 30, 1982), *reprinted in* 1983 U.S.C.C.A.N. 4415 7
S. Rep. No. 101-226, *reprinted in* 1990 U.S.C.C.A.N. 198 26
To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S.2744 and S.3645 Before the S. Comm. on Indian Affairs, 73d Cong. 266 (1934) .. 18, 19

TABLE OF AUTHORITIES - continued

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Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983) 21

General Accounting Office Report, No. GAO-02-49 21

Francis Paul Prucha, *The Great Father* (1984) 31

INTEREST OF *AMICUS CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, federal, and state governments on a range of Indian issues, including the implementation of the Indian Reorganization Act of 1934 ("IRA") and the trust-acquisition authority principally at issue here. NCAI's members represent a cross-section of tribal governments. Great variations exist among them, including with respect to their lands, economic bases, populations, and histories. All of the Tribes, however, share a common interest in opposing the attack made here by petitioners (collectively, "the State") on the authority of the Secretary of the Interior to acquire land in trust for Indian Tribes. For the past 74 years, the trust authority has been critical for the Tribes in restoring a measure of economic self-sufficiency and political self-determination. The State's approach would threaten to halt, or even undo, much of that progress.

NCAI briefed the trust-acquisition issues before the First Circuit and presented oral argument both to the panel and to the en banc court. NCAI thus

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[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than NCAI, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

has a strong interest in refuting the State's arguments here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State here mounts a frontal assault on the Secretary of the Interior's implementation of the Indian Reorganization Act of 1934, an act that sought to address the widespread problems of Indian poverty, lack of opportunity, loss of land base, and dislocation by providing Indian Tribes with clear avenues for self-government, land acquisition, natural-resource management, and improved employment and education.

Although one would not know it from the State's briefs, what is at issue here is the validity of a long-standing interpretation of the IRA, reflected in formal agency regulations issued after notice and comment, and due full deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Secretary's land-into-trust regulations — the ones at issue in this case — have been in place for more than a quarter century, and they extend the benefits of the IRA to all federally recognized Tribes — as do all of the other current regulations implementing the provisions of the IRA. Nor is this a recent conversion by the Secretary, as the Brief of the United States demonstrates. *See* US Br. 30-36 (recounting 74-year history of the Act).

The State contends, nevertheless, that these formal agency regulations and this administrative practice are unambiguously foreclosed by the "plain language" of the IRA. Under 25 U.S.C. § 479, the

IRA provides that the definition of an Indian "shall include," among others, "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." Focusing its attention on the single word "now" in that definition, the State contends that Congress unambiguously restricted IRA benefits to Tribes that were both recognized and under federal jurisdiction in 1934, regardless of their federal status today.

The consequences of accepting the State's construction of the IRA would be severe. Since 1934, the Secretary has recognized dozens of Tribes, all of which are eligible for the IRA under the Secretary's interpretation of the Act. Adopting the State's position would deprive many of these Tribes of access to the IRA's benefits, including the access to trust land that was a centerpiece of the IRA, and which today is critical to the efforts of Tribes both to achieve political self-determination and economic success and to protect their tribal culture and identity. Moreover, the State's position would open the door to years of litigation about the status of tribal land long thought to be settled.

If all of that were what Congress unambiguously required, then that congressional directive would control, the considered administrative practice and severe practical consequences notwithstanding. But Congress has not so required, and it did not do so by using the word "now."

At the outset, the State's focus on the word "now" is misguided. Indeed, even if everything the State says about the IRA were correct, the Secretary would *still* have the authority to take land in trust for the

Narragansett Indian Tribe. That is because Congress made Section 465 independently applicable to "all tribes" when it enacted the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983). Since the Narragansetts indisputably fall within the scope of ILCA, all of the State's sound and fury about the IRA is for naught.

But even if the IRA were the sole source of authority, the State's position would be untenable. As this Court has noted repeatedly, statutory construction is a "holistic endeavor," and the words of a statute often become clear when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quotation marks omitted). Here, considering both the entirety of this foundational Act and its place in the overall statutory framework governing modern Indian affairs, the IRA cannot be read as an unambiguous command to limit eligibility for IRA benefits to Indian Tribes that were recognized and under federal jurisdiction in 1934.

First, the IRA provides only that the definition of Indian "shall include" members of those Tribes now under federal jurisdiction. The statutory definition thus extends IRA eligibility to certain Indians, but it leaves ample room for the Secretary to conclude that other Indians — including members of all currently federally recognized Tribes — should come within the Act's broad scope.

Second, the word "now" is not the rigid straightjacket that the State contends. Either standing alone or in context, the word "now" can

reasonably be read to mean "at the time the statute is applied," as it does in numerous other statutes, and as the Secretary has read it to mean here. Moreover, the State's insistence that "now" refers to 1934 attributes to Congress the absurd intent that Tribes that were recognized in 1934 but later terminated would remain eligible for IRA benefits, and Tribes recognized today but not in 1934 would remain ineligible. Not only is that result preposterous on its face, it is directly contrary to what the legislative history reveals to be Congress's actual intent in adding the key language.

Third, the statutory definition of who qualifies as an individual "Indian" does not constrain the Secretary's authority under Section 465 to take land in trust for an "Indian tribe."

Finally, the State's view of "unambiguous" congressional intent cannot be squared with subsequent legislation. The IRA must be construed not in a vacuum, but instead as part of an effort by Congress to construct a statutory framework that reflects a coherent federal Indian policy. Against that backdrop, the State's argument again falls short: Statute after statute reflects an effort by Congress to preclude the arbitrary distinctions among groups of Tribes that the State seeks to create.

The State seeks to salvage its position by offering its own "policy" rationale, portraying the IRA as a narrow effort by Congress to overturn the specific policy of allotment. But that argument is meritless. As this Court has recognized repeatedly, the IRA embodied a broad federal effort to end a decades-long

policy of assimilation, a thorough and at times brutal approach, the impact of which still reverberates today. The State's misreading of history thus cannot save its misreading of the statute.

For all these reasons, the First Circuit en banc was correct to conclude — unanimously — that the Secretary of the Interior had ample authority for the trust acquisition here.

ARGUMENT

I. THE INDIAN LAND CONSOLIDATION ACT GIVES THE SECRETARY AUTHORITY UNDER SECTION 465 TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE.

The State's challenge to the Secretary's exercise of his Section 465 authority focuses exclusively on the language of the IRA. As demonstrated by the brief of the United States, and as we show below, that challenge is meritless. It is also irrelevant. That is because the Indian Land Consolidation Act independently empowers the Secretary to use Section 465 to take land into trust for the Narragansett Indian Tribe.[2]

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[2] The argument that ILCA independently confers the requisite Section 465 trust authority was presented to the First Circuit panel and to the en banc court. *See, e.g.*, NCAI Opening Br. 16-17; NCAI En Banc Br. 15; U.S. Supp. En Banc Br. 12. The First Circuit did not reach that issue, having concluded that the Secretary had reasonably construed the IRA. *See Jones v. United States*, 527 U.S. 373, 398 (1999) (judgment may be defended on any ground properly raised below).

Congress enacted ILCA in 1983. Section 203 of ILCA provides:

> The provisions of section 465 of this title *shall apply to all tribes* notwithstanding the provisions of section 478 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

25 U.S.C. § 2202 (first emphasis added).[3]

The intended scope of ILCA was undeniably broad. The section-by-section analysis of the Act explains that ILCA "extends the provisions of Section [465] to all tribes," so that Section 465 "would automatically be applicable to any tribe, reservation or area excluded from such Act, including tribes that have previously voted to reject the 1934 Act pursuant to section [478]." H. Rep. No. 97-908, at 7 (1982), *reprinted in* 1983 U.S.C.C.A.N. 4415, 4416.

ILCA's definition of a "Tribe" reflects the intended breadth of the Secretary's trust authority and eliminates any argument that this authority is restricted by the date of a Tribe's federal recognition. "Tribe" is defined in ILCA as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." 25 U.S.C. § 2201(1). This definition plainly

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[3] Section 478 allowed Tribes to opt out of the IRA. *See* 25 U.S.C. § 478 (exempting any Tribe that "voted against [the Act's] application" before June 18, 1936).

encompasses the Narragansetts.[4] Accordingly, ILCA independently grants authority under Section 465 for the Secretary to execute the challenged trust acquisition, and the First Circuit's construction of the Secretary's trust-acquisition authority therefore must be affirmed.[5] Any effort by the Court to go on to address the State's arguments concerning the original language of the IRA would constitute an impermissible advisory opinion.

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[4] The definition presents other issues that need not, and should not, be resolved here. ILCA's legislative history confirms that Congress intended the Secretary's trust authority to extend to *all* Tribes. The reading most consistent with that purpose, and with the grammatical rule of the last antecedent, *see Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), would be to apply the clause "for which, or for the members of which, the United States holds land in trust" only to the word "community." Any broader limitation — for example, reading ILCA to extend Section 465 only to Tribes that already have trust land — would be irrational, contrary to the broad text and plain purpose of § 2202, and inconsistent with the overall structure of ILCA, which applies to both trust and restricted fee lands. *See, e.g.*, 25 U.S.C. §§ 2203(a), 2204(a). But even if the statute were limited to Tribes that have trust land — an issue the Court need not and should not address — the Narragansetts would qualify, having transferred 1800 acres to the United States in trust nearly two decades ago in a decision that the State has never contested. Pet. App. 12; Carcieri Br. 9.

[5] As § 2202's proviso suggests, ILCA would not defeat any contention that the Rhode Island Indian Claims Settlement Act independently bars the trust acquisition here. For the reasons set forth in the briefs filed by the United States and by the Narragansetts, NCAI agrees that the Settlement Act does not independently bar the trust acquisition.

II. THE SECRETARY HAS STATUTORY AUTHORITY UNDER THE IRA TO TAKE LAND IN TRUST FOR THE NARRAGANSETT INDIAN TRIBE.

Even setting aside ILCA, the IRA cannot be read to validate the State's position that eligibility for the benefits of the IRA is limited to Tribes that "were both federally recognized and under federal jurisdiction at the time of the IRA's enactment in 1934." Carcieri Br. 2; *see id.* at 13, 15. On that point, all the judges of the First Circuit agreed. Pet. App. 9 (majority opinion); *id.* at 72 n.25 (Howard, J., dissenting on other grounds); *id.* at 78 (Selya, J., dissenting on other grounds) (joining Howard's dissent "unreservedly").

The State challenges an agency construction of a statute that has been embodied in formal regulations for more than a quarter century. Indeed, the Secretary has promulgated regulations implementing all aspects of the IRA, and all of those regulations — including the land-into-trust regulations — extend the benefits of the IRA to all federally recognized Tribes. *See, e.g.*, 25 C.F.R. § 151.2(b), (c)(1) (implementing § 465); *id.* § 5.1(a) (implementing § 472); 42 C.F.R. § 136.41(a) (same for Indian Health Service); 25 C.F.R. § 163.1 (implementing § 466); *id.* § 81.1(b) (implementing, *inter alia*, §§ 476, 477). *See generally* US Br. 4, 30-31. And those formal regulations themselves arise out of a 74-year history of the Secretary's implementation of the Act. *See id.* at 31-36.

In making its challenge, the State faces a heavy burden. The Secretary's interpretation of the IRA is

reviewed under the familiar *Chevron* framework. Where, as here, the agency acts in formal regulations issued pursuant to delegated authority, the Court must uphold the Secretary's reasonable regulations under *Chevron* unless, after due consideration of the "text, structure, purpose, and history" of the statute as well as its "relationship to other federal statutes," the Court is convinced that Congress has unambiguously foreclosed the Secretary's interpretation. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Put another way, this Court must uphold the Secretary's reading of the statute if it is a permissible one, even if it is not the one this Court would adopt in the first instance. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron*, 467 U.S. at 843-44 & n.11.

Here, moreover, the State's burden is particularly heavy. *First*, the Secretary's interpretation arises in the context of Indian affairs, where the Executive Branch has always had substantial authority and discretion. The Executive Branch has independent constitutional authority over Indian affairs pursuant to both the treaty-making and war powers. U.S. Const. art. II, § 2, cls. 1-2; *see Morton v. Mancari*, 417 U.S. 535, 552 (1974); *see also Board of Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). And for most of our Nation's history, Congress has recognized the shared responsibility for Indian affairs by bestowing a broad grant of authority, permitting the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9 (originally enacted in the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738); *see also id.* § 2 (giving Commissioner of

Indian Affairs "management of all Indian affairs and of all matters arising out of Indian relations") (originally enacted in the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564). The view of the Executive Branch on its authority to deal with Indian Tribes thus merits special weight.

Second, the Court undertakes the *Chevron* analysis applying the canon that "[w]hen we are faced with ... two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: [S]tatutes are to be construed liberally in favor of the Indians." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks omitted); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). That canon is "rooted in the unique trust relationship between the United States and the Indians," *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985), a relationship directly implicated by the IRA here. Moreover, because that canon was well settled by the time Congress enacted the IRA, *see, e.g.*, *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89-90 (1918); *Choate v. Trapp*, 224 U.S. 665, 675 (1912), Congress should be presumed to have enacted the IRA well aware that any effort to limit the Act's broad remedial scope could be accomplished only by the clearest of terms.

The State cannot surmount these hurdles.

A. The IRA Leaves Ample Room for the Secretary's Reasonable Interpretation.

According to the State: (1) Section 479 provides an exhaustive definition of the term "Indian"; (2) the

word "now" in that definition requires the conclusion that the term "Indians" under the Act includes only members of Tribes that were "recognized" and "under Federal jurisdiction" in 1934; and (3) Section 465 permits the Secretary to take land in trust only "for Indians," and thus only for Tribes recognized and under federal jurisdiction in 1934. That argument fails at every level.

1. The Definition of "Indian" Is Not Exhaustive.

The State's argument hinges on Section 479's definition of "Indian." Although purporting to offer a plain-language reading of that definition, the State's briefs entirely ignore its opening text: "The term Indian as used in this Act *shall include* ...." 25 U.S.C. § 479 (emphasis added). As that text makes clear, Section 479 does not purport to set forth an exhaustive list of what the term Indian "means," but only what the term "shall include." As this Court reiterated unanimously just months ago, "the word 'includes' is usually a term of enlargement, and not of limitation." *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008) (quotation marks omitted).

Nor was the Court in *Burgess* breaking new ground. Consistent with the plain meaning of "include," this Court has repeatedly acknowledged that the term is "inclusive rather than exclusive." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312 n.9 (1978); *see, e.g.*, *United States v. New York Tel. Co.*, 434 U.S. 159, 169 (1977) (holding that rule defining property to "include" certain items "does not restrict or purport to exhaustively enumerate all the items which may be seized" under the rule); *Groman v. Comm'r*, 302 U.S. 82, 86 (1937) (term "include" is one

of "expansion" rather than "definition"); *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2188 (2008) ("include" indicates that "[t]he considerations set forth in [the rule] are nonexclusive"); *see also Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle") (citing cases).

The plain language, moreover, confirms that Congress intended the term "include" to be non-exhaustive. When Congress defined "tribe" later in Section 479, it used the words "shall be construed to refer to," rather than "shall include." 25 U.S.C. § 479. The juxtaposition between the illustrative approach to defining "Indian" and the exhaustive approach to defining "tribe" is stark, and presumed intentional. *See New York Tel.*, 434 U.S. at 371 n.15 ("[w]here the definition of a term in [the rule] was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"); *Burgess*, 128 S. Ct. at 1578 n.3 (same); *Groman*, 302 U.S. at 86 (same); *American Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) (same, in case issued one year prior to IRA).

Thus, even if the State here were correct that "now" in Section 479 means "in 1934," that would be of no moment. The plain text makes clear that the three examples listed in the definition of "Indian" are not exclusive, and that the Secretary retains the authority to reasonably expand the definition, as he did here.

2. Congress Did Not Unambiguously Require "Now" to Mean "At the Time of Enactment."

Even setting aside the State's disregard of the term "shall include," the State's construction of the definition of an "Indian" fails because the word "now" does not unambiguously refer to the time of enactment.

a. There is no single dictionary meaning of "now." At the outset, the State's "dictionary" plain-language argument proves nothing. "Now" in a statute can be (as the State suggests) static, fixing the relevant point in time as the date of enactment. *See* Carcieri Br. 23-24 (citing examples). Or "now" can refer (as the Secretary has concluded) to the time the statute is applied. *See, e.g., United States v. Reily*, 290 U.S. 33, 40-41 (1933) (holding that statute that eliminated alienation restrictions on land held by any Kickapoo Indian who was "now or hereafter" residing outside the United States did not apply to a Kickapoo who resided in Mexico at the time of enactment in 1906 but had returned to Oklahoma by 1929, when he inherited the land); Pet. App. 20 (citing examples); US Br. 18-19 (same); *see also* Comment to Unif. Child Custody Jurisdiction Act § 14(a)(1), 9 U.L.A. 580 (1999) (explaining that the term "now" in the phrase "does not now have jurisdiction" means "at the time of the petition," not when the legislature enacted the statute). And, of course, suggesting that "now" means "at the present time," *see* Carcieri Br. 19, proves nothing, since on the date of the Act's passage the "present time" was June 18, 1934, whether "now" means "time of

enactment" or "time of application." The dictionary alone simply cannot answer the question here.

The State relies heavily on the fact that "now" means "in 1934" in other parts of the statute. In Section 465, the Act describes legislation then before Congress as "now pending"; and in Section 472, the Act refers to positions maintained "now or hereafter." In each provision, the word "now" surely means "in 1934." According to the State, similar words must be given similar construction throughout the statute. *See* Carcieri Br. 21.

As this Court noted in *General Dynamics v. Cline*, however, the idea that a word has identical meaning throughout an Act is only a "presumption," and one that "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 540 U.S. at 595; *see also id.* (citing cases); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). And where, as here, the term at issue is a "common" rather than a technical term that in "ordinary conversation" has multiple meanings that are easily understood, the State's presumption has particularly little force. *Cline*, 540 U.S. at 596.

Moreover, the State ignores the cardinal rule that statutory language "must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Id.* (citation omitted; alteration in original). "Now" in Section 465 and in Section 472 must mean "in 1934" precisely because *other words* in the statute make that meaning clear. Thus, the meaning of "now" in

the phrase "measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927)," 25 U.S.C. § 465, or in "positions maintained, now or hereafter," *id.* § 472, is clear not because the word "now" has only a single meaning, but rather because the word "now" in those provisions is surrounded by other words that limit its scope. In Section 479, by contrast, the unadorned "now" lacks those surrounding words of limitation and thus leaves space for the Secretary's reasonable construction.

b. The Secretary's reading makes sense of the Act. There is, moreover, good reason to believe that the Secretary's construction is the far better one. For one thing, if Congress had wanted to limit the time of recognition to a date certain in 1934, it could have done so expressly. Indeed, the very next clause in Section 479 incorporates a specific date: June 1, 1934. The contrast between that date and the term "now," which appears earlier in the same sentence, must be presumed intentional.

In addition, if the State is correct about the meaning of the word "now," Congress could easily have written the second example in the definition of Indian to refer to "descendants of such members *now residing* within the present boundaries of any reservation," rather than "descendants of such members *who were, on June 1, 1934, residing* within the present boundaries of any reservation." That Congress saw the need to avoid the term "now" and specify the 1934 date suggests that Congress did not understand "now" to mean "in 1934."

Equally important, the State's approach leads to absurd results. For example, Section 461 provides

that "hereafter, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive Order, purchase, or otherwise, shall be allotted in severalty to any Indian." 25 U.S.C. § 461. That provision was written broadly to end the disastrous allotment policy. Under the State's reading, however, Section 461 leaves in place the allotment statutes for any Tribe recognized after 1934, so that, for example, a Tribe recognized and given a reservation by Congress in 1936 would still be subject to allotment, since the General Allotment Act of 1887 (Dawes Act) is still technically on the books. *See* 25 U.S.C. § 331; Felix S. Cohen, *Handbook of Federal Indian Law* 217 (1942) (noting that Section 461 "is incompatible with and, therefore, supplants all prior laws, both general and special, purporting to authorize allotments in severalty in any form on any reservation to which the act applies, and this notwithstanding the fact that the act contains no general repeal provision"). That cannot be what Congress intended.

Moreover, under the State's view that "now" freezes the IRA in 1934, a Tribe that was recognized in 1934 but that later had its recognition terminated — which happened in significant number during the Termination Era of the 1950s, *see* Robert T. Anderson, Bethany Berger, Philip P. Frickey & Sarah Krakoff, *American Indian Law: Cases and Commentary* 142 (1st ed. 2008) — remains eligible to receive lands in trust under Section 465 even though it has been terminated; termination does not change the fact that the Tribe was recognized and under federal jurisdiction in 1934. That a terminated Tribe would be eligible for benefits while a currently

recognized Tribe would not is an absurdity that Congress again could not have intended. *See United States v. Granderson*, 511 U.S. 39, 56 (1994) (interpreting statute to avoid absurd results).

c. The legislative history supports the Secretary's reading. Such a reading is particularly inapt because the legislative history demonstrates that the absurd result is precisely the *opposite* of what Congress intended. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (calling it "entirely appropriate to consult all public materials, including the ... legislative history of [the statute's] adoption" to assess whether Congress intended the absurd result attributed to it). The legislative history here is uniquely illuminating because it includes a transcript of the very colloquy in which the phrase "now under Federal jurisdiction" was added to the statute. Senate Committee Chairman Wheeler opined that certain Tribes that were under federal supervision should not be, and that they should eventually be excluded from the Act:

> [Y]ou have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong. 266 (1934).

Senator O'Mahoney responded by noting that these Tribes, if later terminated, should be automatically excluded from the Act's coverage "by some separate provision." *Id.*

Commissioner of Indian Affairs Collier then proposed language to effectuate that goal:

> Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1, insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half blood would get help.

Id.

Thus, the legislative history strongly suggests that, far from freezing eligibility for IRA benefits in 1934, the very purpose of the term "now under Federal jurisdiction" was to preclude certain Indian Tribes — such as Chairman Wheeler's northern California Tribes — from laying claim to the Act's benefits once terminated. The State's result is not only absurd, but precisely the opposite of what Congress intended.[6]

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[6] Below, the State suggested that this absurdity was overstated because the statutes that terminated Indian Tribes after the IRA often provided expressly that termination ended all tribal benefits. But the Congress that enacted the IRA could not have known how future Congresses would draft termination legislation. It is unreasonable to posit that Congress in 1934

d. The State's reading is inconsistent with the nature of federal recognition. Finally, the State's interpretation of "now" should be rejected because the resulting regime would be inconsistent with the nature of federal recognition. "Federal recognition is just that: recognition of a previously existing status." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994). In other words, federal recognition by the Secretary of the Interior "acknowledges" a Tribe's continuous historical tribal existence. *See id.*[7]

Because recognition reflects a historical fact, the only reason that a Tribe would be recognized currently but not in 1934 is that the federal government — due to mistake, neglect, or lack of awareness — failed to acknowledge the Tribe's existence.[8] The State's approach would bind the

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drafted legislation that would permit absurd results in the hope that future Congresses would draft around the absurdity.

[7] The Secretary's regulations make that clear: among the "mandatory criteria" for federal acknowledgment is the requirement that the proposed Tribe "has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b); *see also id.* § 83.7(c), (e); Law Professors Br. 29-31.

[8] As the Law Professors Brief makes clear, *see id.* at 9-22, the concepts of being "recognized" and "under Federal jurisdiction" were more fluid in the 1930s than they are today. There was, for example, no "list" of federally recognized Tribes to which policymakers could turn, and it is even plausible to read the concepts of "recognized" Tribes and Tribes "under Federal jurisdiction" to refer broadly to groups of Indians who could constitutionally be subjected to the Indian affairs power under *United States v. Sandoval*, 231 U.S. 38 (1913), and *United States v. Candelaria*, 271 U.S. 432 (1926).

government to its earlier misdeeds or mistakes, to the detriment of the Tribe, without any reasonable justification. *See, e.g., City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 (D.D.C. 1980); *see also* General Accounting Office, Report No. GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, Appendix I, at 24 (Nov. 2001) ("[T]he underlying position of the administration has always been that the executive branch can correct mistakes and oversights regarding which groups the federal government recognizes as Indian tribes ....").

This case illustrates the problem. The district court correctly noted that "there can be no serious dispute concerning the Narragansetts' tribal status in 1934." Pet. App. 113. "[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications," and have a "documented history dating from 1614." *Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). As the State would have it, the government is bound by its failure to recognize this history, and the Tribe must suffer the consequences. Congress should not lightly be understood to have ordained such a capricious regime through a statute designed to help Tribes that had already suffered so greatly at the hands of prior federal policy.

3. Section 465 Provides the Secretary with Broad Authority to Take Land in Trust for an "Indian Tribe."

Even if the State could excise the words "shall include" from the statute and could fix the meaning

of "now" at the time of enactment, the State still would not prevail. Section 465 permits land to be taken into trust for an "Indian tribe or individual Indian," 25 U.S.C. § 465, and the Narragansetts are an "Indian tribe." Thus, the trust acquisition at issue here fits comfortably within the plain language of the Act.

The State argues to the contrary, asserting that the phrase "for the purpose of providing land for Indians" in Section 465 limits the Secretary to acquiring trust land only for Tribes recognized and under federal jurisdiction in 1934. *See* Carcieri Br. 17-18. That argument is doubly mistaken.

First, as the United States describes at length, neither the term "Indians" nor the term "Indian tribe" in Section 465 incorporates Section 479's definition of an individual Indian, and thus the Secretary's authority to take land in trust for a federally recognized Tribe remains undiminished. *See* US Br. 12-14.

Second, even if the State were correct that "Indians" as used in Section 465 incorporates the definition provided by Section 479, the quoted portion of Section 465 articulates at most the provision's purpose; as such, it is no limit on the scope of the provision's substantive reach. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801-02 (2008). In short, because Section 465 broadly permits land to be taken in trust for an "Indian tribe," the Secretary had ample authority for the trust acquisition here.

The word "now," in short, was never intended to eviscerate the Secretary's authority under the IRA.

Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

B. Subsequent Legislation Confirms the Secretary's Statutory Authority Here.

Congressional legislation over the past quarter century confirms the legitimacy of the Secretary's interpretation here.

As this Court has recently reaffirmed, statutory construction is a "holistic endeavor," and "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). In determining the possible meanings of a statute, subsequent legislation is instructive, because "[o]ver time, ... subsequent acts can shape or focus those meanings." *Brown & Williamson*, 529 U.S. at 143. Particularly in areas such as Indian law where Congress enacts a body of legislation designed to create a coherent federal solution to complex policy challenges, this Court cannot sensibly interpret a statute with a narrow focus on any particular word or provision. Instead, it must more broadly take on "[t]he 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)); *see also United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("[A] specific policy embodied in a later federal statute

should control our construction of the [earlier] statute, even though it has not been expressly amended."). Reconciling the IRA with the general body of federal Indian law leaves no doubt that the Secretary has acted properly here.

1. The State's Reading Is at Odds with the Body of Federal Indian Legislation.

The State's contention that the IRA bars the Secretary from acquiring land under Section 465 for Tribes recognized after 1934 — which includes all Tribes recognized by the federal administrative recognition process — is flatly inconsistent with federal statutes that embody Congress's view that the time and manner of federal recognition is irrelevant to the rights, privileges, and immunities a Tribe possesses.

In 1994, for example, Congress amended the IRA for the very purpose of eliminating the kinds of distinctions the State contends are mandatory here. Section 476(f) covers all regulations issued "pursuant to the Act of June 18, 1934 ... or any other Act of Congress," and it prohibits any federal regulation that "classifies, enhances, or diminishes the privileges and immunities available to [a federally recognized] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(f). Section 476(g) similarly invalidates existing federal regulations that create distinctions in the privileges and immunities available to federally recognized Tribes. *Id.* § 476(g). The principal intent of the amendments was to eliminate distinctions among federally recognized Tribes. *See, e.g.*, 140 Cong. Rec. 11235 (1994)

(statement of cosponsor Sen. Inouye) ("[E]ach federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States."); *see also* US Br. 37 (quoting similar statement of cosponsor Sen. McCain). Indeed, had regulations reflecting the State's interpretation of Section 465 been in place in 1994, they would have been eliminated by Section 476(g), and Section 476(f) would have prevented their adoption later.

That same federal policy is reflected in numerous pieces of legislation that demonstrate Congress's intent to eliminate, not perpetuate, distinctions among Tribes. Thus, for example, the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §§ 479a & 479a-1, requires the Secretary to list all federally recognized Tribes without distinguishing among them by date or method of recognition. In the findings accompanying the List Act, Congress observed that Indian Tribes "may be recognized by Act of Congress; by the administrative recognition procedures set forth in [25 C.F.R. Part 83]; or by a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791, 4791. Congress required that all Tribes be placed on a single list — regardless of the means of recognition — because the list "should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 103(8), 108 Stat. at 4792.

Moreover, Congress has repeatedly acted to extend the IRA's scope and to eliminate distinctions in eligibility for the IRA's critical provisions, confirming Congress's view that there is no place for distinctions such as the State seeks to have the Court draw here. As discussed above, *see supra* Part I, ILCA opens the land-into-trust benefits of Section 465 even to Tribes that rejected the IRA, and it does so using broad language. Similarly, in 1990, Congress enacted Section 478-1, which, "notwithstanding Section 478" — *see supra* n.3 (discussing Section 478) — extends Sections 462 and 477 to "all Indian tribes." 25 U.S.C. § 478-1; *see also* S. Rep. No. 101-226, at 10-11, *reprinted in* 1990 U.S.C.C.A.N. at 198 (noting that "[t]his amendment is consistent with the extension in 1983 of another provision of the 1934 Act relating to land acquisition to all tribes under Section 203 (25 U.S.C. § 2202) of the Indian Land Consolidation Act").

The Secretary has gotten the message. In regulation after regulation, the Secretary has defined the term "Indian" and "Indian tribe" to extend to all federally recognized Tribes. *See, e.g.*, 25 C.F.R. § 20.100 (defining "Indian tribe" for implementation of Indian financial assistance and social services programs); *id.* § 23.2 (same for Indian Child Welfare Act); *id.* § 36.3 (same for minimum standards for schools operated by the Bureau of Indian Affairs); *id.* § 39.2 (same for Indian School Equalization Program); *id.* § 162.101 (leasing and permitting tribal lands); *id.* § 166.4 (general grazing regulations); *id.* § 211.3 (leasing tribal lands for mining).

Against this backdrop of Congress's body of federal Indian law, it makes no sense to interpret Congress's grant of trust-acquisition authority as requiring the Secretary to maintain rigid lines between Tribes recognized in 1934 and Tribes recognized thereafter. When Congress has made plain its view that the Executive Branch should not draw broad and arbitrary distinctions among Tribes, this Court should not hold that such distinctions are nonetheless required.

2. Congress Has Enacted Legislation That Presumes the Secretary's Reading of the IRA Is Correct.

The State's position also conflicts with subsequent federal legislation that is premised on the Secretary's having authority to take land in trust for Tribes recognized by the Secretary after 1934. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, establishes a framework for conducting gaming operations on tribal lands. In the so-called "after-acquired lands" provision, Congress generally restricted gaming operations on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," *id.* § 2719(a), but created an exception for lands taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary *under the Federal acknowledgement process*." *Id.* § 2719(b)(1)(B)(ii) (emphasis added).

In other words, Congress created an express exception in IGRA to address the very scenario that the State claims cannot exist: the Secretary's use of his land-into-trust authority to create a reservation

for a newly acknowledged Tribe — indeed, for a Tribe whose initial reservation was established after October 17, 1988, more than half a century after passage of the IRA. That Congress saw fit in IGRA to account for the Secretary's exercise of his trust authority for newly acknowledged Tribes is powerful evidence that the Secretary possesses such power in the first place. *See, e.g., Loving v. United States*, 517 U.S. 748, 770 (1996) (interpreting earlier statute to convey disputed power to President when subsequent statute was premised on the President's having that power); *NationsBank of N.C., N.A., v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 (1995) (upholding agency's interpretation of National Bank Act as granting disputed authority to banks because "Congress' insertion of [a] limitation decades after the Act's initial adoption makes sense only if banks already *had* the [the challenged] authority" (emphasis in original)). *See generally Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).[9]

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[9] The fact that Congress has consistently refrained from overturning the Secretary's settled construction of the Act despite repeated amendments to the IRA is further evidence that the construction is permissible, especially since (as the IGRA discussion above demonstrates) Congress was aware of the Secretary's claim to the authority challenged here. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986).

C. Nothing in the 1936 Department Circular Compels a Different Result.

As the United States has indicated, an internal Department of the Interior circular from 1936 treats the word "now" in Section 479's definition of "Indian" as referring to "1934." US Br. 34-36. The circular itself is focused principally on a different issue — the determination of "half-blood" status under Section 479 — and contains no analysis of the term "now," which is set forth only in passing in the introduction setting out the basic definition of an "Indian." That circular sheds no light on the issues before the Court.

At the outset, the circular is relevant *at most* to the meaning of the term "now." As set forth above, however, the meaning of "now" is beside the point: ILCA independently extends Section 465 to "all tribes," including the Narragansetts; Congress made clear that the definition of an "Indian," which "shall include" the examples listed in Section 479, is not exhaustive; and Section 465 permits the Secretary to take land in trust for any "Indian tribe," which includes a federally recognized Tribe such as the Narragansetts. Thus, the circular is of no moment for the dispositive questions here.

Moreover, even with respect to the word "now," the circular is of little weight because the Secretary has taken a contrary approach in formal regulations promulgated in notice-and-comment rulemaking. Even if the interpretation in the circular had been set forth in formal regulations, the Secretary would *still* be entitled to change positions, and the current regulations would govern. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). An internal

memorandum plainly cannot override the Secretary's subsequent formal interpretation of the statute. *Id.* at 742-43. And that is all the more true when, as here, the internal memo (1) reflects no analysis of the meaning of "now"; (2) does not grant or deny benefits to any Indian or Tribe; (3) is at odds with the legislative history; and (4) conflicts with the slew of Solicitor's Opinions and regulations from the 1930s and 1940s that are consistent with the approach embodied in formal regulations today. US Br. 32.

D. The IRA Was Not Targeted Narrowly at the Victims of Allotment.

Faced with the implausible argument that its reading of the statute requires the Court to overturn considered agency regulations and settled expectations on the basis of a single word — "now" — the State invents a policy justification to make the implausible seem less so.

Portraying the IRA as principally a statute designed to end the allotment of Indian lands, the State contends that its construction of the IRA "makes eminent sense" because "only those tribes that were federally recognized and under federal jurisdiction at the time of the IRA's enactment would have been subject to the allotment policy that the IRA was intended to remedy." Carcieri Br. 15.

But the State is simply mistaken. Tribes that had never been subject to allotment — such as the Mississippi Band of Choctaw Indians — were covered by the IRA, as this Court recognized in *United States v. John*, 437 U.S. 634, 649-50 (1978), and no one disputes that all half-blood Indians were covered,

whether or not those Indians had been subject to allotment.

Equally to the point, the State's view of the purpose of the IRA is intolerably narrow. The decades preceding the IRA were marked by a policy of assimilation, as policymakers sought to eradicate native religions, indigenous languages, and communal ownership of property to shift power from tribal leaders to government agents. *See* Francis Paul Prucha, *The Great Father* 609-916 (1984).[10]

The IRA was "sweeping" legislation that was part of the effort to undo this history by addressing issues of Indian poverty and lack of opportunity. The Act's "overriding purpose" was to "establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically." *Mancari*, 417 U.S. at 542.

Tribes were encouraged to "'revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973), which would in turn render them eligible for economic-development loans from a revolving credit fund, as well as other federal

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[10] The Narragansetts were themselves victims of assimilationist policies. Throughout the 1800s, the State of Rhode Island sought to "extinguish [the Narragansetts'] tribal identity." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). The State's campaign culminated in 1880 when the Tribe "s[old] (for $5,000) all but two acres of its reservation." *Id.* (citing William G. McLoughlin, *Rhode Island* 221 (1978)).

assistance. *See* 25 U.S.C. §§ 469-470, 476-478; Felix S. Cohen, *Handbook of Federal Indian Law* § 1.05, at 86 (2005 ed.). And, of course, Congress addressed the loss of Indian lands, including the loss of lands through allotment. *See, e.g.*, 25 U.S.C. § 461 (prohibiting further allotment); *id.* § 462 (extending indefinitely restrictions on alienation); *id.* § 463 (restoring unsold "surplus" lands to tribal ownership); *id.* § 465 (providing land-in-trust authority). But Congress nowhere limited the land-acquisition provisions to the victims of allotment, and the provisions have always been applied more broadly, with the result that over the last 70 years, virtually all federally recognized Indian Tribes have had land taken into trust, much of it — thousands of parcels covering millions of acres — pursuant to Section 465.

In short, the attempt to limit the Act or its critical land-into-trust provision to the victims of allotment is spun from whole cloth, and it cannot save the State here.

III. THE INVALIDATION OF THE SECRETARY'S REGULATIONS WOULD BE DEVASTATING FOR NEWLY ACKNOWLEDGED TRIBES.

The State's casual disregard for the Secretary's formal regulations and its radical reinterpretation of the text and purpose of the IRA threaten severe consequences for Tribes recognized administratively since 1934. Since the Termination Era concluded in the early 1960s, some 30 Tribes have been recognized administratively. *See* Law Professors Br. 42-44. And many more received entitlement to the benefits of the IRA as a result of opinions issued by

the Solicitor of the Interior in the 1930s and 1940s. Many of those Tribes have had land taken in trust under Section 465, and many (if not all) have availed themselves of the other benefits of the IRA. Adopting the State's interpretation of the Act would wreak havoc on these Tribes.

First and foremost, the State's approach would eliminate the Tribes' ability to acquire trust land, because, for the vast majority of post-1934 Tribes (as for the vast majority of Indian Tribes generally), Section 465 provides the only means for acquiring additional trust land.[11] Today, many Tribes have pending before the Secretary land-into-trust applications that are critical to the Tribes' political, economic, and cultural revitalization, and years of planning have been spent in reliance on the Secretary's long-standing interpretation. The State's argument, if accepted, would halt this process of revitalization in its tracks.

Indeed, the importance of trust land to Indian Tribes cannot be overstated. Even today, while many Tribes have made notable advances, nationwide, Indian Tribes continue disproportionately to face conditions of poverty,

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[11] For a few Tribes, the Secretary has independent statutory authority, although even that authority is often limited. The Miccosukee Tribe (25 U.S.C. § 1747(a)), the Mohegan Tribe (*id.* § 1775c(a)), the Wampanoag Tribe (*id.* § 1771d), and the Death Valley Timbi Shoshone Tribe (Pub. L. No. 106-423), for example, all have statutory authorizations for the Secretary to take specific land in trust; other trust acquisitions require Section 465.

homelessness, crime, increased mortality rates, and lack of education. By nearly any measure, the standard of living for Indians is far below what most Americans enjoy. *See, e.g.*, Anderson, Berger, Frickey & Krakoff, *American Indian Law: Cases and Commentary*, *supra*, at 7-9.

Land provides an opportunity for Tribes to break this cycle of poverty and dependence. Taking land in trust can give Tribes economic independence, allowing for the formation of tribal businesses and employment of tribal members, while facilitating tribal economic development and allowing Tribes to develop their own independent tax base.

In addition, having trust land enables Tribes to exercise effective self-government. A land base is essential for Tribes to run schools and health clinics, build housing for their members (as the Narragansetts have sought to do since 1992 on the land at issue here), and provide court, law-enforcement, and an array of other critical government services.

More broadly, trust land enables Tribes to build a long-term homeland, protected from alienation or condemnation. As the drafters of the IRA understood, land is the engine for economic and political independence. *See generally* Cohen, *Handbook of Federal Indian Law* § 15.01, at 965 (2005 ed.) (describing importance of tribal lands). For many Tribes, the State's approach would stop that engine in its tracks.

In addition, the definition of an "Indian" in Section 479 triggers eligibility for an array of federally funded benefits and services, including

Indian schooling and preference in employment within the Bureau of Indian Affairs and the Indian Health Service. Members of Indian Tribes recognized after 1934 would be ineligible for many of these essential IRA programs.

The State's approach would, moreover, cast a cloud on past acquisitions and investments by the Tribes, ensuring litigation for decades for newly recognized Tribes. These Tribes can expect, for example, litigation over the status of previously acquired trust lands, which currently constitute reservations that are home to members of the Tribes and that house the businesses that have contributed to the Tribes' economic rebirth.

To be sure, the Tribes believe that the Indian-land exception in the Quiet Title Act, 28 U.S.C. § 2409a(a), prevents any challenge to land already taken into trust. *See id.*; U.S. Br. 4 n.1. The States and their allies, however, have not generally conceded that these challenges would be barred, and even the threat of such claims would likely trigger years of litigation and be tremendously destabilizing in the meantime.[12]

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[12] The Town of Charlestown denies the existence of any problem, making the preposterous assertion that "[s]ince the 1970s, with at most one or two exceptions, the Department has converted lands into trust for non-1934 Act tribes only pursuant to a separate settlement or other act of Congress." Charlestown Br. 34 n.12. NCAI addressed this assertion at length below, submitting deeds and other records to the court of appeals to demonstrate that the Secretary had regularly taken land in trust for Tribes not recognized and under federal jurisdiction in 1934. *See* NCAI Post-Argument En Banc Br. 5-12. Indeed, for

In short, the State's position would deny newly recognized Tribes access to trust land, cutting off their ability to create a homeland and eliminating their principal avenue for self-government and economic independence. To read that outcome as an unambiguous requirement of the IRA — a foundational statute designed broadly to address tribal dependence, landlessness, and poverty — is truly to go through the looking glass.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

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several Tribes, the Secretary had taken land in trust despite express findings of federal courts or agencies that the Tribe was unrecognized throughout much of the twentieth century. *See id.*

Respectfully submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF
AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Washington, DC 20005
(202) 466-7767

IAN HEATH GERSHENGORN
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000

RIYAZ A. KANJI
KANJI & KATZEN, PLLC
101 North Main Street
Suite 555
Ann Arbor, MI 48104
(734) 769-5400

PHILIP P. FRICKEY
UNIVERSITY OF CALIFORNIA,
BERKELEY
SCHOOL OF LAW
892 Simon Hall
Berkeley, CA 94720
(510) 643-4180

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Petitioners,

v.

DIRK KEMPTHORNE, Secretary of Interior, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE AND NOTTAWASEPPI HURON BAND OF THE POTAWATOMI IN SUPPORT OF RESPONDENTS

DOUGLAS B. L. ENDRESON
Counsel of Record
WILLIAM R. PERRY
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Amici Curiae Standing Rock Sioux Tribe and Nottawaseppi Huron Band of the Potawatomi

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SECTION 5 OF THE IRA AUTHORIZES THE SECRETARY TO ACQUIRE LAND IN TRUST FOR ALL INDIAN TRIBES	4
A. The Plain Language of § 465 Authorizes the Secretary to Acquire Land for All Indian Tribes, and the Purpose of the Statute is Fulfilled by Such Acquisitions.	4
B. The Statutory Scheme of the IRA Confirms That § 465 Authorizes the Secretary to Acquire Land for All Indian Tribes.	12
C. The Indian Land Consolidation Act Confirms That § 465 Authorizes Land Acquisitions for All Tribes.	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
Ali v. Fed. Bureau of Prisons, ___ U.S. ___, 128 S.Ct. 831 (2008)	10
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932)	7
Bryan v. Itasca County, 426 U.S. 373 (1976)	12, 18
Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)	9
Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)	6, 8
Cent. Machinery Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980)	16
Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978)	7
Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)	4
Chickasaw Nation v. United States, 534 U.S. 84 (2001)	10
Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007)	2
City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005)	2, 6, 8
County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)	6, 8
Dep't of Housing and Urban Dev. v. Rucker, 535 U.S. 125 (2002)	10
Duncan v. Walker, 533 U.S. 167 (2001)	12
Environmental Def. v. Duke Energy Corp., ____ U.S. ____, 127 S.Ct. 1423 (2007)	6, 7
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992)	6

TABLE OF AUTHORITIES—Continued

	Page
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	18
Fed. Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95 (1941)	9
Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	17
Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004)	8
Hibbs v. Winn, 542 U.S. 88 (2004)	8
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	6, 9
Montana v. United States, 450 U.S. 544 (1981)	8
Montclair v. Ramsdell, 107 U.S. 147 (1883)	12
Morton v. Mancari, 417 U.S. 535 (1974)	2, 9
Morton v. Ruiz, 415 U.S. 199 (1974)	16
Phelps Dodge Corp. v. Nat'l Labor Relations Bd., 313 U.S. 177 (1941)	10
Robinson v. Shell Oil Co., 519 U.S. 337 (1992)	6, 9, 12
Russello v. United States, 464 U.S. 16 (1983)	9
United States v. Estate of Romani, 523 U.S. 517 (1998)	18
United States v. Fausto, 484 U.S. 439 (1988)	18
United States v. Gonzales, 520 U.S. 1 (1997)	10
United States v. Menasche, 348 U.S. 528 (1955)	12
United States v. State of Washington, 520 F.2d 676 (9th Cir. 1975)	10

TABLE OF AUTHORITIES—Continued

	Page
Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	15
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	13
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	14
Worcester v. Georgia, 31 U.S. 515 (1832)	17
Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., ___ U.S. ____, 127 S.Ct. 1534 (2007)	4

STATUTES

25 U.S.C. § 2	15
25 U.S.C. § 13	16
25 U.S.C. § 13a	17
25 U.S.C. § 177	17
25 U.S.C. § 194	14
25 U.S.C. § 261	16
25 U.S.C. § 262	16
25 U.S.C. § 450h(a)	17
25 U.S.C. § 461	12
25 U.S.C. § 465	*passim*
25 U.S.C. § 466	13
25 U.S.C. § 467	13
25 U.S.C. § 469	13
25 U.S.C. § 471	13
25 U.S.C. § 472	13
25 U.S.C. § 476	11
25 U.S.C. § 476(e)	11
25 U.S.C. § 477	13
25 U.S.C. § 478	3, 13
25 U.S.C. § 479	*passim*

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 480	13
25 U.S.C. § 482	13
25 U.S.C. § 483	13
25 U.S.C. § 641	13
25 U.S.C. § 1326	18
25 U.S.C. § 2202	3, 4, 18
28 U.S.C. § 1360	18
43 U.S.C. § 1457	15
48 Stat. 984	12
Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45	15
Act of March 2, 1889, 25 Stat. 888	2
Pub. L. 100-581, § 101	11
Pub. L. 83-280, 67 Stat. 589	12, 18
REGULATIONS	
25 C.F.R. Part 151	10
25 C.F.R. § 166.1(a)	13
MISCELLANEOUS	
78 Cong. Rec. 11125 (1934)	7
Powers of Indian Tribes, 55 Int. Dec. 14 (1934)	11

IN THE

Supreme Court of the United States

No. 07-526

DONALD L. CARCIERI, Governor of Rhode Island, *et al.*,
Petitioners,

v.

DIRK KEMPTHORNE, Secretary of Interior, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE AND NOTTAWASEPPI HURON BAND OF THE POTAWATOMI IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI [1]

Amici are federally recognized Tribes, which suffered devastating losses of land which continue to plague the Tribes today.

[1] The parties have consented to the filing of this brief. This brief was not authored, in whole or in part, by counsel for any party, and no party or other person (other than Amici) provided any monetary contribution to fund the preparation or submission of this brief.

The Standing Rock Sioux Tribe has a Reservation in North and South Dakota. *See* Act of March 2, 1889, 25 Stat. 888. Through various federal policies including allotment, about 900,000 acres of Reservation trust land have been lost. The resulting checkerboarded Reservation significantly impedes Tribal self-government and economic progress.

The Nottawaseppi Huron Band of the Potawatomi petitioned for federal recognition in 1934, but did not obtain federal recognition until 1995. *See Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007). In 2002, the Secretary of the Interior, pursuant to 25 U.S.C. § 465, determined to take a parcel of about 78 acres into trust for the Tribe as an initial Reservation, an action upheld by the D.C. Circuit. *Id.*

Amici Tribes share an interest in the proper interpretation of 25 U.S.C. § 465 to enable them to restore a land base as needed to "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

SUMMARY OF ARGUMENT

Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, authorizes the Secretary of the Interior to acquire land for Indian tribes, as this Court has repeatedly made clear, most recently in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 192, 220 (2005). In the instant case, petitioners argue that the phrase "for the purpose of providing land for Indians" in § 465 unambiguously limits the tribes for which the Secretary may acquire land to those whose members satisfy the definition of "Indian" under Section 19 of the IRA, 25 U.S.C. § 479, and more specifically, to Indian tribes that were

federally recognized on June 18, 1934, the day the IRA was enacted.

This disjointed construction is rejected by the plain language of § 465, which shows that "the purpose of providing land for Indians" is fulfilled by taking land in trust "for the Indian tribe or individual Indian for which the land is acquired." *Id.* Read in that context, it is clear that the former phrase uses the term "Indians" to refer to the Indian tribes and individual Indians for which the Secretary is authorized to acquire land by the latter. With respect to Indian tribes, that authority extends to all tribes within the broad definition set forth in section 19 of the Act, 25 U.S.C. § 479, under which "tribe" means "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." The Secretary's authority is not limited to tribes that were recognized on June 18, 1934, and indeed, that date does not appear in either § 465 or § 479. Petitioners' contrary contention relies entirely on the separate definition of "Indian" set forth in § 479. But however that definition is construed, it can not change the meaning of "tribe." Accordingly, this case does not turn on the meaning of the word "now" in the definition of "Indian" in § 479 – and this Court need not follow petitioners in their detour down that road.

In any event, the question presented here was definitively resolved in 1982, when Congress enacted the Indian Land Consolidation Act ("ILCA"), section 203 of which, 25 U.S.C. § 2202, expressly extended the application of § 465 to "all tribes," including those which had earlier rejected the application of the IRA at an election conducted by the Secretary of the Interior pursuant to Section 18 of the Act, 25 U.S.C. § 478. Congress declared that "[t]he provisions of

section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title. . . ." 25 U.S.C. § 2202. This statute rejects the petitioners' attempt to separate Indian tribes that were recognized in 1934 from those that were recognized later.

ARGUMENT

I. SECTION 5 OF THE IRA AUTHORIZES THE SECRETARY TO ACQUIRE LAND IN TRUST FOR ALL INDIAN TRIBES.

Petitioners seek to overturn the Secretary's interpretation of § 465 by proffering a construction which they assert is clear and unambiguous. That argument fails, as the plain language of § 465 sustains the reasonableness of the Secretary's interpretation, which must be upheld even "if the language of the statute is open or ambiguous – that is, if Congress left a 'gap' for the agency to fill." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, ____ U.S. _____, 127 S.Ct. 1534, 1540-41 (2007) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

A. The Plain Language of § 465 Authorizes the Secretary to Acquire Land for All Indian Tribes, and the Purpose of the Statute is Fulfilled by Such Acquisitions.

Petitioners contend that the statutory phrase "for the purpose of providing lands for Indians," and more specifically the word "Indians" in that phrase, limits the tribes[2] for which the Secretary may acquire land

[2] 25 U.S.C. § 479 defines "tribe" as follows:

under § 465 to those whose members are "Indian[s]" as defined by 25 U.S.C. § 479.[3] In their view, when the Secretary seeks to acquire land for a tribe under § 465, he must first test the tribe's members under § 479 to determine whether they are: (1) "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," *id.*, or (2) "persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," *id.*, or (3) "persons of one-half or more Indian blood." *Id.*[4] Petitioners contend that under the test for the first category, the Secretary is only authorized to acquire land for "recognized Indian tribe[s] now under federal jurisdiction," and that "now" means June 18, 1934, the day on which the IRA was enacted.[5]

Petitioners' tortured construction fails because it ignores the plain language of § 465, reads the phrase "for the purposes of providing land for Indians" out of

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> The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

[3] 25 U.S.C. § 479 defines "Indian" as follows:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

[4] This test would also apply to the second category. The third category is not at issue here.

[5] While the Court need not reach this issue, we agree with the Respondents that "now" refers to the time when the definition set forth in § 479 is applied.

its statutory context, and assumes that the word "Indians" in § 465 must mean "Indian" as defined by § 479. As settled rules of statutory construction instead direct, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). In fact, the same term may be interpreted differently in different provisions of the same statute. *Id.* at 341-344 (term "employees" has different meaning in different sections of Title VII); *Environmental Def. v. Duke Energy Corp.*, _____ U.S. ____, 127 S.Ct. 1423, 1432-34 (2007) (statutory definition of "modification" in the Clean Air Act may be interpreted differently in different regulations).

First, it is clear that § 465 authorizes the Secretary to acquire land for Indian tribes. As this Court very recently explained, by "authoriz[ing] the Secretary of the Interior to acquire land in trust for Indians" in § 465, "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220 (2005) (citing *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998)). *See also County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (§ 465 provides for acquiring lands on behalf of the tribes); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-159 (1973) (§ 465 exempts permanent improvements on land leased by the Tribe from the Forest Service from state use tax).

Second, petitioners' argument that the word "Indians" in the phrase "for the purpose of providing land for Indians" must mean "Indian" as defined by § 479 is not correct. As this Court explained in *Environmental Def. v. Duke Energy Corp.*, ___ U.S. ___, 127 S.Ct. 1423, 1432 (2007), the "principles of statutory construction are not so rigid." Instead, "the natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

The purpose of § 465 – "providing land for Indians" – is, by its plain language, fulfilled by taking such land "in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* (emphasis added).[6] Read in context, the word "Indians" in the phrase "for

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[6] This is confirmed by the legislative history of the IRA. S. 3645, the bill that, as amended, became the IRA, initially authorized the acquisition of land only for Indian tribes. The authorization for the Secretary to acquire land for individual Indians was subsequently added by amendment. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978) (citing 78 Cong. Rec. 11126 (1934)). Prior to the amendment, Section 5 of S. 3645 would have authorized the Secretary to acquire land "for the purpose of providing land for Indians," only by taking title "in trust for the Indian tribe for which the land is acquired." 78 Cong. Rec. 11125-26. The amendment inserted the words "or individual Indians" after the word "tribe." *Id.* at 11126. This history reinforces the understanding that taking land into trust for tribes furthers the fundamental purpose of "providing land for Indians."

the purpose of providing land for Indians" refers to the Indian tribes and individual Indians "for which the land is acquired" to fulfill that purpose.[7] This reflects "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004)). Petitioners' argument also wrongly construes the statute's purpose to limit the means chosen by Congress to achieve that purpose. Instead, acquisitions of land in trust that are specifically authorized by § 465 – including acquisitions for Indian tribes – define the manner in which Congress has chosen to implement its purpose.

If petitioners were correct, and the term "Indians" in the purpose phrase of § 465 meant only "Indians" as defined by § 479, the Secretary could then acquire land only for persons who satisfy the statutory definition of "Indian" – not for Indian tribes. This result is rejected by the plain language of § 465, and by this Court's construction of § 465 in *City of Sherrill*, 544 U.S. at 220, *Cass County*, 524 U.S. at 114-15, and *County of Yakima*, 502 U.S. at 255. Furthermore, if the Secretary were unable to acquire land for Indian tribes, the IRA would be powerless to reverse the loss of tribal land by which the allotment policy sought to achieve "the ultimate destruction of tribal government." *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981). The IRA sought to change this course by "putt[ing] a halt to the loss of tribal lands through

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[7] In much the same manner, the word "land" in the phrase "for the purpose of providing land for Indians" must be read to include "water rights," which § 465 also authorizes the Secretary to acquire.

allotment," *Mescalero Apache Tribe*, 411 U.S. at 151, "g[iving] the Secretary the power to create new reservations," *id.*, authorizing land to be taken in trust for Indian tribes, *id.* at 155, and "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton v. Mancari*, 417 U.S. 535, 542 (1974). If the Secretary could only acquire land for "Indians" as defined by § 479, it would "effectively vitiate" the provisions of the IRA which implement the IRA's objectives, *see Robinson*, 519 U.S. at 345-346, which counsels forcefully against petitioners' position. *Id.*

Seeking to sidestep this problem, petitioners concede that the Secretary may acquire land for some Indian tribes under § 465, but then turn to the definition of "Indian" in § 479 in an effort to limit that group to the tribes that were recognized when the IRA was enacted. This effort fails because § 479 separately defines "tribe" without imposing any such limitation. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006) (selective inclusion of limiting language in different provisions of a statute is presumed to be intentional and purposeful) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Thus, whether or not the definition of "Indian" in § 479 is limited in the manner petitioners urge,[8] that limitation has no application to the

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[8] We note in this regard that the definition of "Indian" in § 479 does nothing more than to include the persons thereafter described within the meaning of the term "Indian" in the Act – it does not limit the term "Indian" to those persons. Indeed, immediately after describing those persons, § 479 adds that "[f]or the purposes of [the IRA], Eskimos and other aboriginal peoples of Alaska shall be considered 'Indians.'" As this Court made clear in *Fed. Land Bank of St. Paul v. Bismark Lumber*

meaning of the term "tribe" under § 479.[9] Under § 479, a "tribe" is "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," *id.* Moreover, "any" is a word that "has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). *See also Ali v. Fed. Bureau of Prisons*, ___ U.S. ___, 128 S.Ct. 831, 835-36 (2008); *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002). As defined by § 479, "tribe" plainly includes a tribe that was recognized after the IRA was enacted.[10]

Co., 314 U.S. 95 (1941), "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Id.* at 99-100 (citing *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 189 (1941)). *See also Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) ("include" means to contain or comprise as part of a whole).

[9] The Solicitor General refers to an internal Memorandum of the Assistant Secretary of Indian Affairs dated October 1, 1980. Brief for the Respondents at 28 n.1. The Memorandum construed the Secretary's authority broadly – to permit taking land into trust for a tribe that was not recognized in 1934. *See United States v. State of Washington*, 520 F.2d 676, 692 (9th Cir. 1975). The reasoning of the Memorandum was internally inconsistent. On the one hand, it acknowledged that "the IRA often uses the term 'Indian' in contexts where it is clear that both tribes and individuals are being referred to," but on the other, it deprived that determination of any effect by proceeding to import the definition of "Indian" from § 479 into its analysis of the scope of § 465. *Id.* at 2 – 7. In any event, the Memorandum is merely an informal determination, and as the Solicitor General points out, the Memorandum failed to even consider the 25 C.F.R. Part 151 regulations which had been published in final form two weeks earlier. Brief for Respondents at 28 n.1.

[10] Likewise, the IRA's provisions to foster tribal self-govern-

Petitioners propose to avoid this result by construing the definition of "Indian" in § 479 to supersede the definition of "tribe" in § 479. Their proposal would effectively delete the words "any Indian tribe, organized band [or] pueblo" from that definition – reducing it to "the Indians residing on one reservation."[11] There is no justification for conflating these two separate definitions, but even if there were, petitioners' interpretation of the definition of "tribe" could not be reconciled with the "duty 'to give effect,

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ment have long been understood to apply to tribes that were recognized at the time of the IRA or thereafter. For example, a comprehensive opinion from the Solicitor of the Department of the Interior (Nathan Margold) issued just after the statute's enactment, discussed the contours of tribal governmental powers that were "vested in any Indian tribe or tribal council by existing law . . ." pursuant to the IRA, 25 U.S.C. § 476(e). As Solicitor Margold concluded, these tribal powers "apply to all Indian tribes recognized now or hereafter by the legislative or executive branch of the Federal Government." Powers of Indian Tribes, 55 Int. Dec. 14, 66-67 (1934). It would be highly anomalous for a tribe that was recognized after 1934 to have the full range of tribal powers under the IRA, but not be eligible to have land taken into trust under the same statute.

[11] The inclusion of "the Indians residing on one reservation" within the definition of "tribe" under § 479 actually rejects the petitioners' attempt to limit the tribes for which the Secretary may acquire land to those that were recognized on June 18, 1934. This is so because, as originally enacted section 16 of the IRA, 25 U.S.C. § 476, authorized "[a]ny Indian tribe or tribes, residing on the same reservation" to organize under its terms, adopt a constitution and bylaws, and exercise "all powers vested in any Indian tribe or tribal council by existing law" as well as certain powers enumerated in Section 476. *Id.* (In 1988, § 476 was amended and the words "or tribes, residing on the same reservation" were stricken. *See* Pub. L. 100-581, § 101.) Section 476 thus permitted the "Indians residing on one reservation" to organize as a tribe, which of course could not be done until after the IRA was enacted.

if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 192 (1883)). Indeed, petitioners' construction of the term "Indian" would effectively eliminate the definition of "tribe" from the IRA.

B. The Statutory Scheme of the IRA Confirms That § 465 Authorizes the Secretary to Acquire Land for All Indian Tribes.

When the meaning of the term "Indians" in § 465 is considered in "the broader context of the [IRA] as a whole," *Robinson*, 519 U.S. at 341, it underscores that "Indians" is used there to refer to Indian tribes and individual Indians collectively. The IRA is itself entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." 48 Stat. 984. In each instance (with the exception of the vocational education purpose) the term "Indians" is plainly intended to include Indian tribes, as it is in § 465. *See Bryan v. Itasca County*, 426 U.S. 373, 385 n.11 (1976) (title of Pub. L. 280, 67 Stat. 589 describing conferral of state jurisdiction over "civil causes of action" supports interpretation of § 4 of Pub. L. 280 as limited to civil causes of action).

Other provisions of the IRA also use the word "Indians" to refer to Indian tribes. Section 1 of the Act, 25 U.S.C. § 461, prohibits the allotment "of any Indian reservation, created or set apart by treaty or

agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, . . ." *Id.*, 25 U.S.C. § 641 (emphasis added). Section 6 of the Act, 25 U.S.C. § 466, directs the Secretary to regulate "Indian forestry units," pursuant to which "the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 146-47 (1980) (emphasis added), and to restrict "Indian range units," which the Secretary does pursuant to regulations that apply to tribal and individual Indian owned lands. *See* 25 C.F.R. § 166.1(a). Consistent with this usage, § 465 authorizes the Secretary to acquire lands "for the purpose of providing land for Indians," *id.* (emphasis added), while section 7 of the Act, 25 U.S.C. § 467, authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, . . ." *Id.* The Act also authorizes funds "to oe expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations," 25 U.S.C. § 469 (emphasis added), which Section 17 of the Act, 25 U.S.C. § 477, makes clear refers to corporations which are chartered to Indian tribes. *Id.*

In contrast, when Congress intended to refer to individual Indians in the IRA, as originally enacted and as amended, it used that term – as does § 465 – or made its meaning clear by the context in which the term "Indian" is used. *See, e.g.*, 25 U.S.C. § 471 ("loans to Indians" for educational purposes); § 472 ("Indians who may be appointed" and "qualified Indians"); § 478 ("majority of the adult Indians"); § 480 ("Indians ineligible for loans"); § 482 ("individual Indians"); § 483 ("individual Indians").

Moreover, the use of the term "Indians" to refer collectively to Indian tribes and individual Indians in statutes that authorize Executive Branch officials to exercise Congressional power in Indian affairs is a common and longstanding practice. Most telling for present purposes is 25 U.S.C. § 194, which was first enacted by Congress in 1822. This statute established the burden of proof in "all trials about the right of property in which an Indian may be a party on one side. . . ." (emphasis added). In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court specifically addressed an argument that the statutory reference to an "Indian" precluded a construction that included a "tribe." The case involved the ownership of lands affected by river movement. It was argued that 25 U.S.C. § 194 did not apply when a tribe (not an individual Indian) is party to the case. In rejecting that argument, this Court stated:

> It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions [now 25 U.S.C. § 194] to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance, given the historical fact that at the time of the enactment virtually all Indian land was tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it]." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Furthermore, "'statutes passed for the benefit of dependant Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County*, 426 U.S.

373, 392 (1976), quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

Id. at 665-66.

Similarly, in a measure dating back to 1832, Congress provided that "[t]he Commissioner of Indian Affairs shall . . . have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (emphasis added). Although Congress did not use the word "tribe" in describing the Commissioner's charge, the Commissioner's duties of course extend to the management of relations with Indian tribes. *See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979) (relying on § 2 to support regulations issued by the Interior Department to regulate Indian tribes' treaty fishing rights). In a like manner, the Secretary of the Interior is today "charged with the supervision of public business relating to . . . Indians," pursuant to 43 U.S.C. § 1457, which was originally codified as § 441 of the Revised Statutes. The Secretary's duties of course include responsibility for Indian tribes and individual Indians.

In 1834, Congress enacted a provision employing similar language to extend Indian preference in employment to "all cases of the appointments of interpreters or other persons employed for the benefit of the Indians." Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45. Likewise, in regulating trade on Indian reservations, Congress (which initially addressed this matter in 1790) referred variously to trading with "tribes" and with "the Indians," without clear distinction. Congress provided that the Commissioner of Indian Affairs "shall have the sole power and authority to appoint traders to the Indian tribes,"

25 U.S.C. § 261, and that any person "desiring to trade with the Indians on any Indian reservation," is required to do so under rules prescribed by the Commissioner. 25 U.S.C. § 262 (emphasis added). Nevertheless, the full regime regarding traders applies to trading with tribes, as well as with individual Indians, on the reservation. *See Cent. Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 162-65 (1980) (Indian trader statutes pre-empt state taxation of on-reservation transaction with an Indian tribe).

Closest in time to the IRA is the Snyder Act, 42 Stat. 208, as amended 25 U.S.C. § 13, enacted in 1921 to authorize the Bureau of Indian Affairs, under the direction of the Secretary, to "expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians . . ." As this Court explained in *Morton v. Ruiz*, 415 U.S. 199 (1974), "the Snyder Act provides the underlying congressional authority for most BIA activities," *id.* at 205-206,[12] which of course include activities con-

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[12] As the Court noted in *Morton*:

> Prior to the Act, there was no such general authorization. As a result, appropriation requests made by the House Committee on Indian Affairs were frequently stricken on the House floor by point-of-order objections. *See* H.R.Rep. No. 275, 67th Cong., 1st Sess. (1921); S.Rep. No. 294, 67th Cong., 1st Sess. (1921); 61 Cong.Rec. 4659-4672 (1921). The Snyder Act was designed to remedy this situation. It is comprehensively worded for the apparent purpose of avoiding these point-of-order motions to strike. Since the passage of the Act, the BIA has presented its budget requests without further interruption of that kind, and Congress has enacted appropriation bills annually in response to the requests.

415 U.S. at 206.

cerning Indian tribes. Indeed, the Snyder Act provides the source of funding used to support contracts entered into by the federal government and Indian tribes under which the tribes provide federally-funded services. 25 U.S.C. § 450h(a). *See also* 25 U.S.C. § 13a (authorizing carryover of funds appropriated under the Snyder Act for use pursuant to self-determination contracts).[13]

As these examples indicate, in construing the breadth of the term "Indians," context matters. In a wide range of settings, Congress has used the term "Indians" to include Indian tribes. Congress enacted the IRA against the backdrop of these statutes, and consistent with their usage, employed the phrase "providing land for Indians" to describe those who benefit from the provision, which includes Indian tribes, whether recognized before or after the IRA was enacted.

C. The Indian Land Consolidation Act Confirms That § 465 Authorizes Land Acquisitions for All Tribes.

As this Court has recognized, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more

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[13] The use by Congress of the term "Indians" in a manner that clearly includes tribes finds parallels in the language of this Court. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832) ("[f]rom the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations") (emphasis added); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (stating in discussion of the Non-Intercourse Act, 25 U.S.C. § 177, that "[t]he obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties. . .") (emphasis added).

specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)). The Court applied this principle in *Bryan v. Itasca County*, 426 U.S. 373 (1976), in relying on § 406 of Title IV of the Civil Rights Act of 1968, 25 U.S.C. § 1326, to determine the scope of the civil jurisdiction conferred on the states in 1953 by § 4 of Pub. L. 280, 67 Stat. 589, 28 U.S.C. § 1360. *See Bryan*, 426 U.S. at 386-388.[14] The same principle applies here.

Congress enacted the Indian Land Consolidation Act ("ILCA") in 1982, and in so doing specifically addressed the reach of § 465, stating that

> The provisions of section 465 of this title shall apply to all tribes, notwithstanding the provisions of section 478 of this title: Provided, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

25 U.S.C. § 2202 (emphasis added). Thus, whatever question might have existed as to whether Section 5 applies to Indian tribes recognized after June 18, 1934, was resolved by the plain declaration set forth in 25 U.S.C. § 2202.

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[14] Section 406 had repealed § 7 of Pub. L. 280 and replaced it with a tribal consent requirement that applied to any further assumption of jurisdiction under Pub. L. 280. The Court found that § 406 supported the conclusion that the jurisdiction conferred by § 4 of Pub. L. 280 extends only to civil causes of action, because § 406 had described the jurisdiction conferred by Pub. L. 280 in those terms.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

DOUGLAS B. L. ENDRESON
Counsel of Record
WILLIAM R. PERRY
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Amici Curiae
Standing Rock Sioux Tribe
and Nottawaseppi Huron
Band of the Potawatomi

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